SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 100

PETER H. KLOPFER, PETITIONER,

vs.

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 3, 1966

[fol. 1]

SUPREME COURT OF NORTH CAROLINA

FIFTEENTH DISTRICT

No. 829

Fall Term 1965
From Orange

STATE,

v.

PETER KLOPFER.

Before Johnson, J., August 1965 Criminal Session, Orange Superior Court—Defendant Appealed.

Office of the Chief Justice of the Supreme Court of the State of North Carolina

ORDER ASSIGNING JUDGE TO SUPERIOR COURT OF ORANGE COUNTY, NORTH CAROLINA

To the Clerk of the Superior Court of Orange County:

This is to certify that the Honorable Clarence W. Hall, Judge of the Superior Court, has been assigned to hold the regularly scheduled sessions of Superior Court for Orange County during the period beginning 1 January 1964, and ending 30 June 1964.

In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina on this 18th day of December 1963.

Emory B. Denny, Chief Justice of the Supreme Court of North Carolina.

Attest:

Bert M. Montague, Administrative Assistant.

[fol. 2]

IN THE SUPERIOR COURT OF ORANGE COUNTY

NORTH CAROLINA

STATEMENT OF CASE

State of North Carolina
Orange County

Be It Remembered, that at a Superior Court duly and regularly begun and held for the County of Orange, at a time and place required by law, to-wit: at the courthouse in Hillsborough, on the 24th day of February, in the year of our Lord one thousand nine hundred and sixty-four, before the Honorable C. W. Hall, Judge, duly commissioned, authorized and empowered to hold said court, upon the oath of E. P. Barnes, Foreman, George V. Taylor, and others (naming them), good and lawful men and women of the county aforesaid, duly summoned, drawn, sworn and charged, to inquire for the State of and concerning all crimes and offenses committed within the body of said county, it is presented in manner and form, that is to say:

SUPERIOR COURT

February Term 1964

State of North Carolina
Orange County

BILL OF INDICTMENT—February 24, 1964

The Jurors for the State Upon Their Oath Present, That Peter Klopfer late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route #3, Chapel Hill, Orange County, North Carolina, said Austin Watts being then and there in actual and peaceable possession of said premises as owner who had, as

owner; the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered by the said Austin Watts, owner, to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and [fol. 3] dignity of the State.

Thomas D. Cooper, Jr., Solicitor.

No. 3556

STATE,

v.

PETER KLOPFER.

Indictment—Trespass

Thomas D. Cooper, Jr., Pros.
Witnesses: Austin Watts, Jeppie Watts.

Those marked ____ sworn by the undersigned foreman, and examined before the Grand Jury; and this bill found x A True Bill.

E. P. Barnes, Foreman Grand Jury.

Commission from Chief Justice Emery B. Denny, to Judge Raymond B. Mallard to hold the three week special session of Superior Court for Orange County, beginning 2 March 1964, for the trial of criminal cases, appears in the original transcript of appeal.

[fol. 2]

IN THE SUPERIOR COURT OF ORANGE COUNTY

NORTH CAROLINA

STATEMENT OF CASE

State of North Carolina
Orange County

Be It Remembered, that at a Superior Court duly and regularly begun and held for the County of Orange, at a time and place required by law, to-wit: at the courthouse in Hillsborough, on the 24th day of February, in the year of our Lord one thousand nine hundred and sixty-four, before the Honorable C. W. Hall, Judge, duly commissioned, authorized and empowered to hold said court, upon the oath of E. P. Barnes, Foreman, George V. Taylor, and others (naming them), good and lawful men and women of the county aforesaid, duly summoned, drawn, sworn and charged, to inquire for the State of and concerning all crimes and offenses committed within the body of said county, it is presented in manner and form, that is to say:

SUPERIOR COURT

February Term 1964

State of North Carolina
Orange County

BILL OF INDICTMENT—February 24, 1964

The Jurors for the State Upon Their Oath Present, That Peter Klopfer late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route #3, Chapel Hill, Orange County, North Carolina, said Austin Watts being then and there in actual and peaceable possession of said premises as owner who had, as

owner, the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered by the said Austin Watts, owner, to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and [fol. 3] dignity of the State.

Thomas D. Cooper, Jr., Solicitor.

No. 8556

STATE,

v.

PETER KLOPFER.

Indictment—Trespass

Thomas D. Cooper, Jr., Pros.
Witnesses: Austin Watts, Jeppie Watts.

Those marked ____ sworn by the undersigned foreman, and examined before the Grand Jury; and this bill found x A True Bill.

E. P. Barnes, Foreman Grand Jury.

Commission from Chief Justice Emery B. Denny, to Judge Raymond B. Mallard to hold the three week special session of Superior Court for Orange County, beginning 2 March 1964, for the trial of criminal cases, appears in the original transcript of appeal.

IN THE SUPERIOR COURT

March Special Criminal Term 1964

No. 3556

STATE,

v.

PETER KLOPFER.

PLEA

The State being represented by Hon. Thomas D. Cooper, Jr., Solicitor and the defendant being represented by Hon. Wade Penny, Attorney. The defendant, through counsel, Pleads Not Guilty to Trespass.

IN THE SUPERIOR COURT OF ORANGE COUNTY

No. 3556

STATE,

v.

PETER KLOPFER.

JURY IMPANELED

Whereupon the following jury is duly impaneled, to-wit:

[fol. 4] Moody Morris, George P. Hogan, David M. Ray, Athena Parker, Howard McAdams, Virginia Julian, George Eubanks, Jane L. Joyner, John L. Carden, Jane M. Atkins, Barbara N. Jones, W. B. Coleman.

IN THE SUPERIOR COURT OF ORANGE COUNTY

No. 3556

STATE,

v.

PETER KLOPFER.

WITHDRAWAL OF JUROR AND DECLARATION OF MISTRIAL

The Court in its discretion withdraws juror Mr. Hogan and declares a mistrial. The defendant will return Monday for a re-trial.

IN THE SUPERIOR COURT

April Criminal Term 1965

North Carolina
Orange County

No. 3556

STATE,

v.

PETER KLOPFER.

(Continued for the term).

Commission from Chief Justice Emery B. Denny, to Judge William A. Johnson, to hold the regularly scheduled sessions of the Superior Court for the Fifteenth Judicial District during the period beginning July 1, 1965 and ending December 31, 1965, appears in the original transcript.

IN THE SUPERIOR COURT OF ORANGE COUNTY

No. 3556

STATE,

v.

PETER KLOPFER.

ORDER ALLOWING NOL PROS AND APPEAL THEREFROM

Nol Pros With Leave.

The defendant, through counsel, Honorable Wade Penny, Excepts. Notice of Appeal.

IN THE SUPERIOR COURT OF ORANGE COUNTY

No. 3556

STATE,

v.

PETER KLOPFER.

ORDER ALLOWING NOL PROS AND APPEAL THEREFROM

The State moves the Court that it be allowed to take a nol pros with leave. The motion is allowed. Defendant takes exception to the entry of the nol pros with leave and gives notice of appeal in open Court. Further notice [fol. 5] waived. Defendant is allowed 15 days in which to prepare statement of case on appeal and the State is allowed ten days thereafter to file countercase or exceptions. Appeal bond in the sum of $200.00 adjudged sufficient. No appearance bond required.

The Foregoing Is Certified by the Clerk of the Superior Court on November 15, 1965.

Organization of Court

On Monday, February 24, 1964, the Grand Jury for the County of Orange, being duly constituted and sworn, returned the following Bill of Indictment—a true Bill against the defendant, Peter Klopfer, in open Court at the February 1964 Criminal Session of the Superior Court of Orange County—the Honorable C. W. Hall, Judge Presiding:

IN THE SUPERIOR COURT OF ORANGE COUNTY

BILL OF INDICTMENT

SUPERIOR COURT

February Term 1964

State of North Carolina
Orange County

The Jurors for the State Upon Their Oath Present, That Peter Klopfer late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route #3, Chapel Hill, Orange County, North Carolina, said Austin Watts being then and there in actual and peaceable possession of said premises as (owner), who had, as (owner), the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, [fol. 6] against the form of the statute in such case made and provided and against the peace and dignity of the State.

Thomas D. Cooper, Jr., Solicitor.

No. 3556

STATE,

v.

PETER KLOPFER.

Indictment—Trespass

Thomas D. Cooper, Jr., Pros.

Witnesses: Austin Watts, Jeppie Watts.

Those marked —— sworn by the undersigned foreman, and examined before the Grand-Jury; and this bill found x A True Bill.

E. P. Barnes, Foreman Grand Jury.

IN THE SUPERIOR COURT OF ORANGE COUNTY

MINUTE ENTRIES

Thereafter, at the March 1964 Special Criminal Session of the Superior Court of Orange County, the Honorable Raymond B. Mallard, Judge Presiding, the defendant, Peter Klopfer, was placed on trial to answer the charge set forth in the aforementioned Bill of Indictment. The State of North Carolina was represented by the Honorable Thomas D. Cooper, Solicitor, Tenth-A Solicitorial District, and the defendant was represented by counsel, Wade H. Penny, Jr., Esq.

The defendant entered a *plea* of Not Guilty, and a jury was duly sworn and impaneled. After hearing the evidence for the State and the defendant, the argument of counsel and the charge of the Court, the jury was unable upon due deliberation to agree upon a verdict. The Court thereupon withdrew a juror and entered an order of mistrial.

Several weeks prior to the April 1965 Criminal Session of the Superior Court of Orange County the Solicitor, the Honorable Thomas D. Cooper, Jr., indicated to the defendant's attorney, Wade H. Penny, Jr., his intention to have [fol. 7] a nol pros with leave entered in the defendant's case. At the April 1965 Criminal Session of the Superior Court of Orange County, with the Honorable William Y. Bickett, Judge Presiding, the defendant, through his attorney, was heard in open Court in opposition to the entry of a nol pros with leave in regard to the aforesaid trespass charge. The defendant's contention at that time was that the trespass charge against the defendant was abated on the authority of the *Hamm* and *Lupper* decision of the United States Supreme Court, 85 S. Ct. 384 (decided December 14, 1964). The Court indicated it approved the entry of a nol pros with leave in the defendant's case. The Solicitor, however, stated he did not desire now to have a nol pros with leave entered in the defendant's case and wanted to retain the case in its trial docket status. The defendant's case was continued for the term at that time.

The trial calendar for the August 1965 Criminal Session of the Superior Court of Orange County did not list the defendant's case for trial. To ascertain the trial status of the defendant's case the following motion was filed:

IN THE SUPERIOR COURT

August Criminal Session 1965

State of North Carolina
Orange County

No. 3556

MOTION TO INQUIRE INTO TRIAL STATUS, ETC.—
Filed August 7, 1965

Now comes the defendant, Peter Klopfer, by and through his attorney, Wade H. Penny, Jr., and respectfully shows unto the Court as follows:

1. That the defendant was charged with the criminal offense of trespass in a bill of indictment returned by the Grand Jury of Orange County at the 1964 February Crim-
[fol. 8] inal Session of the Superior Court of Orange County, which Bill of Indictment reads in substance as follows:

> "The jurors for the State upon their oath present, that Peter Klopfer, late of the County of Orange, on the 3rd day of January 1964, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts, located at Route No. 3, Chapel Hill, Orange County, North Carolina, said Austin Watts, being then and there in actual and peaceable possession of said premises as *owner, who had, as owner,* the authority to exercise his control over said premises, and said Peter Klopfer, after being ordered by the said Austin Watts, owner, to leave the said premises, wilfully and unlawfully refused to do so, knowing or having reason to know that he, the said Peter Klopfer, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

2. That at the 1964 March Special Criminal Session of the Superior Court of Orange County, the defendant, Peter Klopfer, was brought to trial upon the aforesaid bill of indictment, which proceeding terminated in an order of mistrial because of failure of the jury to agree upon a verdict.

3. That the offense of trespass with which the defendant is ch[illegible]ged arose out of an attempt by the defendant and oth[illegible]s to obtain service at a restaurant which was a "place of public accommodation" within the meaning of the 1964 Federal Civil Rights Act which was subsequently passed in the summer of 1964; that the Supreme Court of the United States in the *Hamm* and *Lupper* decision, 85 S. Ct.

384, decided December 14, 1964, held that the Civil Rights Act of 1964 has retroactive effect so as to bar pending [fol. 9] prosecutions of persons who previously sought service at establishments which were included as a "place of public accommodation" in the Civil Rights Act of 1964; that this principle was subsequently applied by the Supreme Court of the United States in the case of *Blow* v. *North Carolina*, 85 S. Ct. 635, decided February 1, 1965, which case was reported originally along with a companion case in 261 NC 463, 135 SE 2d 14, and 261 NC 467, 135 SE 2d 17, and which case bears a striking similarity as to its operative facts with the facts in the case pending against the defendant.

4. That the defendant, Peter Klopfer, contends that the prosecution pending against him is barred and abated by the authority of the cases cited above; and that, at the very least, the effect of the cases cited above is to render the bill of indictment pending against the defendant fatally defective in that said bill of indictment purports on its face to make unlawful the exercise of a legal right which was secured to the defendant by the passage of the Civil Rights Act of 1964, which right to obtain service was given retroactive effect by the cases cited above.

5. That it has now been some eighteen months since the defendant was charged in said pending bill of indictment; that the next regular session of the Superior Court of Orange County at which criminal cases may be tried does not begin until December 13, 1965, said session being a one-week mixed session; that the Solicitor for the State has previously proposed to enter a nol pros with leave in the charge pending against the defendant to which entry the defendant objected and does now strenuously object in view of the circumstances cited above; that the continued pendency of said charge against the defendant is causing substantial and recurring problems in regard to the defendant's scheduling lecture and conference trips out- [fol. 10] side the State of North Carolina and trips outside

the United States in connection with research projects of the defendant, said defendant being a Professor of Zoology at Duke University and said research including projects for the Defense Department of the United States Government; that the defendant seeks to have said charge pending against him permanently concluded in accordance with the applicable laws of the State of North Carolina and of the United States as soon as is reasonably possible.

Wherefore, the defendant, Peter Klopfer, by and through his attorney, Wade H. Penny, Jr., petitions the Court that the Court in the exercise of its general supervisory jurisdiction inquire into the trial status of the charge pending against the defendant and to ascertain the intention of the State in regard to the trial of said charge and as to when the defendant will be brought to trial.

Respectfully submitted, this
7th day of August 1965.

Wade H. Penny, Jr., Attorney for Defendant, Peter Klopfer.

Filed: Saturday, August 7, 1965.
C. S. C. Orange County.

IN THE SUPERIOR COURT OF ORANGE COUNTY

ENTRY OF NOL PROS WITH LEAVE

In response to the foregoing Motion, the status of the defendant's case was considered in open Court on Monday, August 9, 1965, by the Honorable William A. Johnson, Judge Presiding, at the August 1965 Criminal Session of the Superior Court of Orange County. The Solicitor moved the Court that the State be allowed to take a nol pros with leave.

Motion Allowed.

The defendant objected and took exception to the entry of the nol pros with leave.

Exception No. 1.

[fol. 11]

IN THE SUPERIOR COURT OF ORANGE COUNTY

APPEAL ENTRIES

The defendant gives notice of appeal in open Court. Further notice waived. The defendant is allowed 15 days in which to prepare statement of case on appeal and the State is allowed ten days in which to file countercase or exceptions. Appeal bond in the sum of $200.00 adjudged sufficient. No appearance bond required.

IN THE SUPERIOR COURT OF ORANGE COUNTY

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

The defendant appellant excepts and assigns as error the following:

1. The Court erred under the law of the State of North Carolina in allowing the entry of nol pros with leave in the defendant's case.

Exception No. 1 (R p 10)

2. The Court erred in allowing the entry of a nol pros with leave in the defendant's case under the circumstances there existing for the reason that said entry deprives the defendant of rights secured to him by the 1964 Federal Civil Rights Act and the United States Constitution.

Exception No. 1 (R p 10)

3. The Court erred in allowing the entry of a nol pros with leave in the defendant's case over the objection of the defendant for the reason that said entry effectively deprives the defendant of rights secured to him by the United States Constitution, including the right to an impartial, fair and speedy trial as required by the Fourteenth Amendment to the United States Constitution.

Exception No. 1 (R p 10).

[fol. 12] The foregoing is respectfully tendered by the defendant appellant as the statement of case on appeal.

This 28th day of August 1965.

Wade H. Penny, Jr., Attorney for Defendant Appellant.

Acceptance of Service

Service of the foregoing case on appeal is accepted and receipt of a copy thereof is acknowledged.

This 28th day of August 1965.

Thomas D. Cooper, Jr., Solicitor, Tenth-A Solicitorial District.

IN THE SUPERIOR COURT OF ORANGE COUNTY

STIPULATION OF COUNSEL

In apt and proper time, counsel for the appellant and the Solicitor for the State stipulated and agreed that the foregoing should be and constitute the case on appeal to the Supreme Court of North Carolina.

This 15th day of November 1965.

Wade H. Penny, Jr., Attorney for Appellant.

Thomas D. Cooper, Jr., Solicitor, Tenth-A Solicitorial District.

[fol. 13]

IN THE SUPREME COURT OF NORTH CAROLINA

Fall Term, 1965

No. 829—From Orange

STATE,

v.

PETER KLOPFER.

OPINION—January 14, 1966

Appeal by defendant from Johnson, J., August, 1965 Criminal Session, Orange Superior Court.

This criminal prosecution was founded upon a bill of indictment signed by Thomas J. Cooper, Solicitor, and submitted by him to the Grand Jury and returned a true bill by that body at its February, 1964 Session, Orange Superior Court. The indictment charged that on January 3, 1964, the defendant "did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts . . . located on Route 3, Chapel Hill, North Carolina, . . . Watts being then and there in peaceable possession, and the said Peter Klopfer, after being ordered to leave the said premises willfully and unlawfully refused to do so, knowing he . . . had no license therefor . . . etc."

At the March, 1964 Special Criminal Session, the defendant, represented by counsel of his own selection, entered a plea of not guilty. The issue raised by the indictment and the plea was submitted to the jury which, after deliberation, was unable to agree as to the defendant's guilt. The court declared a mistrial and ordered the case set for another hearing. Thereafter, the record discloses the following:

"No. 3556—State v. Peter Klopfer

"The State moves the Court that it be allowed to take a nol pros with leave. The motion is allowed. Defendant takes exception to the entry of the nol pros with leave and gives notice of appeal in open court."

T. W. Bruton, Attorney General,
Andrew A. Vanore, Jr., Staff Attorney, for the State

Wade H. Penny, Jr., for defendant appellant.

Higgins, J.

The appellant challenged the right of the solicitor, even with the approval of the judge, to enter a *nolle prosequi* with leave in the criminal prosecution pending against [fol. 14] him in the Superior Court. Stated another way, he insists his objection takes away from the solicitor and the court the power and authority to enter the order. The reason assigned is that the procedure denies him his constitutional right of a speedy trial.

When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. When a *nolle prosequi with leave* is entered, the consent of the court is implied in the order and the solicitor (without further order) may have the case restored for trial. "A *nolle prosequi*, in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." Wilkinson v. Wilkinson, 159 NC 265, 74 SE 968; State v. Thurston, 35 NC 256. Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. In this case one jury seems

to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort.

In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record. The order is

Affirmed.

[fol. 15]

SUPREME COURT OF NORTH CAROLINA

Fall Term, 1965

No. 829 Orange County

STATE,

vs.

PETER KLOPFER.

JUDGMENT—January 14, 1966

This cause came on to be argued upon the transcript of the record from the Superior Court Orange County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Carlisle W. Higgins Justice, be certified to the said Superior Court, to the intent that the Judgment Is Affirmed

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-Three and No/100 dollars ($33.00),

and execution issue therefor. Certified to Superior Court this 24th day of January 1966.

A True Copy.

Adrian J. Newton, Clerk of the Supreme Court.
By: Kathryn W. Bartholomew, Deputy Clerk.

[fol. 16]

IN THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

STATE,

v.

PETER KLOPFER.

CLERK'S CERTIFICATE

Appeal docketed 16 November 1965

Case argued 14 December 1965

Opinion filed 14 January 1966

Final Judgment entered 14 January 1966

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 7th day of April 1966.

Adrian J. Newton, Clerk of the Supreme Court of North Carolina.

(Seal)

[fol. 17]

SUPREME COURT OF THE UNITED STATES

No. 1216, October Term, 1965

PETER H. KLOPFER, Petitioner,

v.

NORTH CAROLINA.

ORDER ALLOWING CERTIORARI—May 31, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of North Carolina is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

Citations

Cases:

Statutes:

In the
Supreme Court of the United States

OCTOBER TERM, 1965

No.

PETER H. KLOPFER, *Petitioner*

v.

STATE OF NORTH CAROLINA, *Respondent*

Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

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Peter H. Klopfer, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered in the case of *State of North Carolina* v. *Peter Klopfer* on January 14, 1966.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina, printed in Appendix A hereto, *infra,* p.p. 12-14, is reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on January 14, 1966, as printed in Appendix A, *infra,* p. 15. The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3).

QUESTION PRESENTED

In a State criminal prosecution, does the State deny to the accused the Constitutional right to a fair and speedy trial by procedurally suspending the prosecution indefinitely over the objection of the accused and without showing any justification for suspending the prosecution indefinitely?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1.) Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2.) Fourteenth Amendment to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

On Monday, February 24, 1964, the Grand Jury for the County of Orange, State of North Carolina returned a Bill of Indictment charging the petitioner, Peter H. Klopfer, with the criminal offense of trespass in violation of N. C. Gen. Stat. 14-134. (R. 5-6.)

Klopfer entered a plea of "Not Guilty" and was placed on trial in the Superior Court of Orange County in March, 1964. The jury could not agree upon a verdict and a mistrial was declared with Klopfer being directed to reappear in court for trial on the following Monday. However, Klopfer's case was not retried at that session of court. (R. 3-4, 6.)

Several weeks prior to the April 1965 Criminal Session of the Superior Court of Orange County, the Solicitor indicated to Klopfer's attorney his intention to have a *nolle prosequi* with leave entered in Klopfer's case. At the April 1965 Criminal Session, Klopfer through his attorney in open court opposed the entry of a *nolle prosequi* with leave. The defendant's contention at that time was that the trespass charge was abated on the authority of *Hamm* v. *City*

of Rock Hill 379 U. S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964). The Court indicated it approved the entry of a *nolle prosequi* with leave in Klopfer's case. The Solicitor then stated he did not desire to take a *nolle prosequi* with leave in Klopfer's case and would retain the case in its trial docket status. Klopfer's case was continued for the term at that time. (R. 6-7.)

The trial calendar for the August 1965 Criminal Session of Orange County Superior Court did not list Klopfer's case for trial. To ascertain the trial status of Klopfer's case, a motion was filed expressing his desire to have the trespass charge pending against him permanently concluded as soon as reasonably possible. The motion requested the Court to inquire into the trial status of the charge pending against Klopfer and to ascertain when his case would be brought to trial. (R. 7-10.)

The motion filed in Klopfer's case also set forth the grounds for Klopfer's contention that further prosecution of the trespass charge was barred by the retroactive application of the 1964 Federal Civil Rights Act on the authority of *Hamm* v. *City of Rock Hill, supra.* (R. 8-9.)

In response to the foregoing motion, the status of Klopfer's case was considered in open court on Monday, August 9, 1965, at the August 1965 Criminal Session of Orange County Superior Court. The Solicitor then moved the Court that the State be allowed to take a *nolle prosequi* with leave in Klopfer's case. The motion was allowed by the Court. (R. 10.)

How Federal Question Is Presented

The petitioner first invoked the Constitutional right to a fair and speedy trial by his motion that his case be concluded permanently as soon as reasonably possible. (R. 7-10.) The Court's response to the motion was to per-

mit the entry of a *nolle prosequi* with leave, to which the petitioner timely excepted. (R. 10.)

The issue involving the Constitutional right to a fair and speedy trial was brought forward on appeal by the petitioner and decided by the Supreme Court of North Carolina on the basis of the exception and an assignment of error specifically embodying the issue. (R. 10-11.)

The Supreme Court of North Carolina decided the Constitutional issue adversely to the petitioner as follows:

"The appellant challenged the right of the solicitor, even with the approval of the judge, to enter a *nolle prosequi* with leave in the criminal prosecution pending against him in the Superior Court. . . . The reason assigned is that the procedure denies him his constitutional right of a speedy trial."

Appendix A, *infra,* p. 13

"Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi.*"

Appendix A, *infra;* p. 14

REASONS FOR GRANTING THE WRIT

1. The decision of the North Carolina Supreme Court in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) permits the State, by utilization of the procedural device of a *nolle prosequi* with leave, to circumvent the accused's Sixth Amendment guarantee of a speedy trial as made applicable to the State by the Fourteenth Amendment.

In North Carolina the entry of a *nolle prosequi* with leave in a pending criminal prosecution is customarily left

to the initiative and discretion of the Solicitor, subject to the control of the court. *State* v. *Furmage,* 250 N.C. 616, 109 S.E. 2d 563 (1959). The effect of a *nolle prosequi* with leave is to discharge the defendant from his bond and from attending court. The defendant is free to go anywhere he chooses without posting a bond to appear in court at any future time. A *nolle prosequi* with leave is not an acquittal. At any time after the entry of a *nolle prosequi* with leave, the defendant may be indicted again for the same offense or the Solicitor, without the necessity of seeking the court's approval, may have the Clerk issue a capias for the defendant and try him on the original indictment. In effect, a *nolle prosequi* with leave reflects the decision of the Solicitor that he will not "at that time" prosecute the suit further. *Wilkinson* v. *Wilkinson,* 159 N.C. 265, 74 S.E. 740 (1912).

North Carolina Gen. Stat. 15-1 provides for a two-year statute of limitations within which to institute criminal prosecution for a general misdemeanor. The offense of trespass with which Klopfer was charged under N. C. Gen. Stat. 14-134 is a general misdemeanor. The return of a bill of indictment charging a misdemeanor arrests the running of the statute of limitations. Of particular relevance to the *Klopfer* case is the rule in North Carolina that entry of a *nolle prosequi* with leave does not start the statute of limitations to running again. *State* v. *Williams,* 151 N. C. 660, 65 S.E. 908 (1909).

As the decision in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) implies, there is no statute or constitutional provision in North Carolina which requires the Solicitor to ever bring Klopfer's case to trial. Equally apparent in the *Klopfer* decision is the fact that Klopfer has no means under North Carolina law to compel the State to give him his day in court.

The most recent pronouncement of this Court relative to the Sixth Amendment right to a speedy trial is in *United States* v. *Ewell,* .....U. S. ....., 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966), in which the scope and purpose of this Constitutional right is stated as follows:

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. . . . . this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' Beavers v. Haubert, 198 U. S. 77, 87, 25 S.Ct. 573, 576, 49 L.Ed. 950. 'Whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances. . . . The delay must not be purposeful or oppressive', Pollard v. United States, 352 U.S. 354, 361, 77 S.Ct. 481, 486, 1 L. Ed.2d 393. '[T]he essential ingredient is orderly expedition and not mere speed.' Smith v. United States, 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L. Ed.2d 1041." *United States* v. *Ewell,* ..... U.S....., 86 S.Ct. 773, 776, 15 L. Ed.2d 627, 630-31 (1966).

Although the *Ewell* case, *supra,* is a federal criminal prosecution, the affirmative safeguards of the Sixth Amendment for an accused have been made applicable to State criminal prosecutions by inclusion in the Fourteenth Amendment. *Gideon* v. *Wainwright,* 372 U. S. 335, 83 S. Ct. 792 (1963); *Escobedo* v. *Illinois,* 378 U. S. 478, 84 S. Ct. 1758 (1964). The following four factors appear to be

those most relevant to a consideration of whether denial of speedy trial to an accused has been extended beyond that period of time reasonably required by the State for the orderly administration of justice: the length of delay, the reason for the delay, the prejudice to the defendant and waiver by the defendant. *United States* v. *Simmons,* 338 F. 2d 804 (2nd Cir. 1964).

Applying these four factors for determining the infringement of the Sixth Amendment right to a speedy trial to the facts in the *Klopfer* case, it becomes apparent that the State of North Carolina can not claim even one of the four factors. As of August, 1965, when Klopfer's motion requesting trial or dismissal of his case was denied, almost eighteen months had elapsed since his indictment. (R. 5-10). The decision of the Supreme Court of North Carolina in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) permits the delay of Klopfer's trial to continue without limitation. At no point in the proceedings, or record thereof (R. 1-12), has the State of North Carolina ever offered any reason whatsoever for the delay in trying Klopfer's case. At no point in the record of the proceeding (R. 1-12) or in the opinion in *State* v. *Klopfer* (Appendix A, *infra,* p.p. 12-14) is there the slightest suggestion that the defendant has in any manner waived his right to a speedy trial. On the contrary, the record discloses clearly that Klopfer affirmatively sought the benefit of his right to a speedy trial in the trial court. (R. 7-10.)

The prejudice to the defendant is quite substantial. He has been put to the burden, anxiety and expense of one trial which ended in a hung jury, and has *not* been afforded another opportunity to exonerate himself. (R. 6-10.) In addition, Klopfer has had stripped from him the protection which the Sixth Amendment right to speedy trial affords against the "anxiety and concern accompanying public

accusation" and the "possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell*, quoted, *supra.*

Counsel for the petitioner has been unable to discover any other case in the nation, State, or Federal, in which a court takes the position, as the North Carolina Supreme Court did in the *Klopfer* case, that criminal prosecution may be instituted against an accused, and yet the accused may be denied forever his day in court by the arbitrary action of the State and over the objection of the accused. The decision in the *Klopfer* case is clearly erroneous by reason of its blatant repudiation of the speedy trial protection afforded to an accused by the Sixth and Fourteenth Amendments.

2. The petitioner's case is of sufficient importance to justify review of the judgment on its merits for the following reasons:

(a.) The indifference toward the plight of an accused in a criminal prosecution as manifested by the Supreme Court of North Carolina in the *Klopfer* decision (Appendix A, *infra,* p.p. 12-14) is evidence of the persistent and prejudicial indulgences in favor of the State and at the expense of the accused which pervade the administration of criminal justice in state courts, particularly in the South. In the *Klopfer* case, the State's pragmatic concern with the economics of a retrial for Klopfer (Appendix A, *infra,* p. 14) was readily given priority over Klopfer's right to have the opportunity of exoneration. If the proper balance between the State and the accused in state criminal prosecutions is to be maintained, it is imperative that arbitrary denial of an accused's Constitutional rights, as has occurred in the *Klopfer* case, be corrected by this Court.

(b.) The State of North Carolina by the entry of a *nolle prosequi* with leave has subjected the petitioner

to a subtle and indirect, but nevertheless burdensome, form of punishment for an offense as to which the State is barred in all probability from obtaining a conviction. (R. 7-10.) The reputation and standing of the petitioner, a professor of zoology at Duke University (R. 10), is being exposed without recourse on his part to the suspicions and adverse repercussions which are naturally attendant in any community toward anyone charged with a criminal offense. Likewise, the petitioner is afforded no relief from the personal anxiety which naturally continues in response to his being subject to retrial whenever it may suit the State to resume prosecution.

(c.) The utilization of the *nolle prosequi* with leave by the State in cases such as Klopfer's, where the accused has challenged the prevailing opinion of the community (R. 7-10), enables the State to stifle, penalize and discourage the exercise of the First Amendment rights of free speech and free assembly by using minor criminal prosecutions to ensnare the participant into the labyrinth of state criminal prosecution where the participant may be harassed and intimidated into silence or inaction. The State's arbitrary manipulation of criminal procedure to impair and discourage the free exercise of First Amendment rights poses a clear and ominous threat to the democratic process requiring redress by this Court.

CONCLUSION

To make effective the guarantee of an accused's right to a speedy trial under the Sixth and Fourteenth Amendments in a state criminal prosecution, the petition for writ of certiorari should be granted.

Respectfully submitted,

Wade H. Penny, Jr.
Counsel for Petitioner
Post Office Box 522
Durham, North Carolina, 27702

APPENDIX A

OPINION AND JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA IN THE CASE OF STATE v. PETER KLOPFER

1. Opinion of the Supreme Court of North Carolina in the case of STATE v. PETER KLOPFER.

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM, 1965

STATE
v.
PETER KLOPFER } No. 829 — FROM ORANGE

Appeal by defendant from Johnson, J., August, 1965 Criminal Session, Orange Superior Court.

This criminal prosecution was founded upon a bill of indictment signed by Thomas J. Cooper, Solicitor, and submitted by him to the Grand Jury and returned a true bill by that body at its February, 1964 Session, Orange Superior Court. The indictment charged that on January 3, 1964, the defendant "did unlawfully, wilfully and intentionally enter upon the premises of Austin Watts . . . located on Route 3, Chapel Hill, North Carolina, . . . Watts being then and there in peaceable possession, and the said Peter Klopfer, after being ordered to leave the said premises willfully and unlawfully refused to do so, knowing he . . . had no license therefor . . . etc.".

At the March, 1964 Special Criminal Session, the defendant, represented by counsel of his own selection, entered a plea of not guilty. The issue raised by the indictment

and the plea was submitted to the jury which, after deliberation, was unable to agree as to the defendant's guilt. The court declared a mistrial and ordered the case set for another hearing. Thereafter, the record discloses the following:

"No. 3556 — State v. Peter Klopfer

"The State moves the Court that it be allowed to take a nol pros with leave. The motion is allowed. Defendant takes exception to the entry of the nol pros with leave and gives notice of appeal in open court."

T. W. Bruton, Attorney General,
Andrew A. Vanore, Jr., Staff Attorney, for the State
Wade H. Penny, Jr., for defendant appellant.

HIGGINS, J.

The appellant challenged the right of the solicitor, even with the approval of the judge, to enter a *nolle prosequi* with leave in the criminal prosecution pending against him in the Superior Court. Stated another way, he insists his objection takes away from the solicitor and the court the power and authority to enter the order. The reason assigned is that the procedure denies him his constitutional right of a speedy trial.

When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. When a *nolle prosequi with leave* is entered, the consent of the court is implied in the order and the solicitor (without further order) may have the case restored for trial. "A *nolle prosequi,* in criminal proceedings, is nothing but a declaration on the part of the solicitor that

he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." Wilkinson v. Wilkinson, 159 N. C. 265, 74 S. E. 968; State v. Thurston, 35 N. C. 256. Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort.

In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record. The order is

Affirmed.

The foregoing opinion is located in and may be cited as: STATE v. KLOPFER 266 N. C. 349, 145 S. E. 2d 909 (1966).

2. Judgment of the Supreme Court of North Carolina in the case of STATE v. PETER KLOPFER.

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

STATE		FALL TERM, 1965
vs.	No 829	
PETER KLOPFER		ORANGE COUNTY

This cause came on to be argued upon the transcript of the record from the Superior Court Orange County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Carlisle W. Higgins, Justice, be certified to the said Superior Court, to the intent that the JUDGMENT IS AFFIRMED. And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-three and No/100 dollars ($33.00) and execution issue therefor. Certified to Superior Court this 24th day of January, 1966.

SEAL

ADRIAN J. NEWTON
Clerk of the Supreme Court

By: Kathryn W. Bartholomew,
Deputy Clerk

Supreme Court of the United States

October Term, 1962

No. 1014 100

PETER KLOPFER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ANSWER TO PETITION

FOR

WRIT OF CERTIORARI

T. W. BRUTON
Attorney General
Justice Building
Raleigh, North Carolina

ANDREW A. VANORE, JR.
Staff Attorney
Justice Building
Raleigh, North Carolina

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Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina, printed in Petitioner's Appendix A, pp. 12-14, is reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under 28 U. S. Code, Section 1257 (3).

QUESTION PRESENTED

In State criminal prosecutions, is an accused's right to a speedy trial circumvented when a state is allowed to take a *nol. pros.* with leave over defendant's objections.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1) Sixth Amendment to the United States Constitution "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2) Fourteenth Amendment to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 24, 1964, a true bill of indictment was returned by the Grand Jury for the County of Orange, State of North Carolina, charging the defendant Peter Klopfer with the criminal offense of Trespass in violation of N. C. G. S. 14-134.

At the March, 1964, Special Criminal Session of the Superior Court of Orange County, State of North Carolina, the defendant was placed on trial to answer the charge as laid in the bill of indictment. The defendant entered a plea of

Not Guilty, and thereafter a mistrial was declared because the jury was unable to decide upon a verdict.

Subsequently, at the August, 1965, Criminal Session of the Superior Court of Orange County, the honorable Judge presiding granted the Solicitor's motion to take a *nol. pros.* with leave as to the trespass charge pending against the defendant.

The defendant objected and appealed to the North Carolina Supreme Court, that Court upholding the Solicitor's right to enter such motion as reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

AN ACCUSED'S RIGHT TO A SPEEDY TRIAL IS NOT CIRCUMVENTED WHEN A STATE IS ALLOWED TO TAKE A NOL. PROS. WITH LEAVE OVER DEFENDANT'S OBJECTION, AND THEREFORE, THIS COURT SHOULD REFUSE PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

Petitioner, in essence, is contending that his having been subjected to criminal prosecution on the charge of Trespass; the refusal of the State to proceed with the prosecution, as evidenced by the entry of a *nol. pros.* with leave, effectively deprived him of the opportunity to exonerate himself and impaired his ability to sustain any defense he might present in Court, thereby violating his constitutional right to a speedy and impartial trial.

The Supreme Court of North Carolina has, since its inception, recognized the right of the Solicitor, with the permission of the Court, to enter a *nol. pros.* In STATE v. FURMAGE, 250 N. C. 616, 109 S. E. 2d 563 (1959), the Supreme Court of North Carolina said, 109 S. E. 2d pp. 567, 568:

> "A solicitor, as a public officer and as an officer of the court, is vested with important discretionary powers. True, it is his responsibility, upon a fair and impartial trial, to bring forward all available evidence and to

> prosecute persons charged with crime. Even so, prior to prosecution, if he finds the available evidence insufficient to support a conviction, he may enter a *nolle prosequi* or *nolle prosequi* with leave. G. S. 15-175; WILKINSON v. WILKINSON, 159 N. C. 265, 74 S.E. 740. In S. v. MOODY, 69 N. C. 529, Reade, J., said: 'It was discussed at the bar whether it is within the power of a solicitor to discharge a defendant or to enter a nol. pros., etc., or whether that is the province of the court. The rule is that it is usually and properly left to the discretion of the solicitor.' Also, see S. v. THOMPSON, 10 N. C. 613; S. v. BUCHANAN, 23 N. C. 59; S. v. CONLY, 130 N. C. 683, 41 S. E. 534; 27 C.J.S., District & Pros. Attys. Sec. 14 (1)."

The distinction between a *nol. pros.* and *nol. pros.* with leave was made in WILKINSON v. WILKINSON, 159 N. C. 265, 74 S. E. 740 (1912), at 74 S. E. p. 741:

> "A *nol. pros.*, in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse, the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias*, after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen." See also, STATE v. SMITH, 129 N. C. 546.

North Carolina has long recognized that when a *nol. pros.* is entered by the Solicitor, this, in effect, terminates the mat-

ter for all practical purposes on the indictment since the defendant becomes amenable to another indictment on the same charge in any court of concurrent jurisdiction. STATE v. McNEIL, 10 N. C. 183 (1820). In so treating the effect of a *nol. pros.*, North Carolina is in the majority of jurisdictions. 21 Am. Jur. 2d, *Criminal Law*, Section 519; Anno., New Prosecution in Another Court, 177 A.L.R. 423.

Therefore, it would appear that a *nol. pros.* or *nol. pros.* with leave, does, for all practical purposes, terminate the proceedings once and for all and in no way jeopardizes a defendant's standing. STATE v. CLAYTON, 251 N. C. 261, 111 S. E. 2d 299.

Concerning Petitioner's contention that he is being denied his right to a speedy trial, the State respectfully contends that the petitioner has no right to compel the State to prosecute. The alleged denial could be used by the petitioner, if the State in the future elects to prosecute, as a shield. However, petitioner should not be allowed to use such a contention as a sword, compelling the State to go to the expense of a trial when obviously the Solicitor feels that "Another go at it would not be worth the time and expense of another effort."

CONCLUSION

The State respectfully contends that the petitioner has not been denied his right to a speedy trial, and therefore, the petition for Writ of Certiorari should be denied.

Respectfully submitted,
T. W. BRUTON
Attorney General

Andrew A. Vanore, Jr.
Staff Attorney

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1210~~ 100

PETER KLOPFER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

WILLIAM W. VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

Attorneys for Amici

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No. 1216

PETER KLOPFER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Civil Liberties Union and the American Civil Liberties Union of North Carolina respectfully move for leave to file a brief as *amici curiae* in this case.

Petitioner has consented in writing to the filing of this brief. The State of North Carolina, respondent, following what the applicant understands to be the routine practice of the Attorney General's office, has refrained from either consenting or objecting to the filing of such brief.

The interest of the American Civil Liberties Union is two-fold: the general interest it holds as a civil liberties organization, and, more specifically, a belief that justice requires at a minimum that this case be heard on its merits.

Since its founding in 1920, the American Civil Liberties Union has sought to prevent and to redress violations of civil liberties protected by the Constitution through litiga-

tion, educational programs, public statements and petitions to the Government. Its intention has never been to further the interest of any special group, but rather to defend the civil liberties of all persons equally. The American Civil Liberties Union hopes that an argument presented by an organization both experienced and specially concerned with maintaining constitutionally guaranteed liberties may be of aid to the Court in its adjudication of the sensitive issues raised by this case.

Amici move for leave to file this brief for two specific reasons:

a. The harm resulting to petitioner and to other criminal defendants whose prosecutions may be indefinitely continued by the granting of *nol. pros.* with leave, and similar devices, warrants the fullest possible exposition of the serious and novel constitutional issues raised by these practices.

b. The unqualified availability of *nol. pros.* with leave, by its presence, its broad application by the solicitor, and its excessively permissive use by the State Supreme Court, is a substantial threat to the free expression of unpopular beliefs and ideas. This issue demands extensive analysis.

We fear that the parties may not fully address themselves to the above issues. We believe our brief will aid the Court by emphasizing these aspects of the litigation. If our arguments were accepted, they would be dispositive of this case.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movant

Questions Presented

1. May a State through its criminal procedure empower the solicitor to suspend a criminal proceeding without explanation or cause and to reinstitute the prosecution at any time, without providing any standards for the solicitor to follow, and thus deny to the accused a speedy trial of the charges pending against him in violation of the Sixth Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution?

2. May a State employ a procedure in a criminal trial the effect of which is necessarily to punish and to stigmatize a person indirectly for that which the State could not otherwise punish him, thus denying Petitioner due process of law?

3. May a State through its criminal procedure give its solicitor the absolute discretion to suspend or try a criminal offense once the indictment has issued, when the necessary effect of such power may discourage or stifle the free expression of unpopular ideas and beliefs protected by the First Amendment?

Statement of the Case

On February 24, 1964, petitioner, Professor Peter Klopfer, was indicted for criminal trespass, punishable by imprisonment for as long as two years. The trespass was alleged to have taken place when he and others, seeking nondiscriminatory service in a place of public accommodation, sought access to the cafe premises of Austin Watts, Chapel Hill, North Carolina. Petitioner pleaded "not guilty" at his trial in March, 1964. After due deliberation upon all the evidence, the jury was unable to reach a verdict. Thereupon the Court withdrew a juror and entered an order of mistrial. Petitioner's case was not retried during any subsequent Criminal Session that year.

Shortly thereafter, but one year after the original mistrial, the solicitor advised petitioner's attorney of his intention to move the Court for a *nol. pros.* with leave. Thereupon, petitioner, through his attorney, opposed in open court at the April, 1965, Criminal Session the entry of such motion in petitioner's case. The solicitor then stated that he wished to retain petitioner's case in its trial docket status.

Petitioner's case was not listed for trial during the August, 1965, Criminal Session. The Court, in response to petitioner's motion seeking ascertainment of the status of his case, inquired into the matter in open court. At that time the solicitor moved the Court for a *nol. pros.* with leave, but without explanation as to why it was appropriate to continue its case. The motion was granted. Petitioner objected and took exception to the entry.

On appeal to the North Carolina Supreme Court the entry of *nol. pros.* with leave was affirmed, *State* v. *Klopfer*, 145 S. E. 2d 909 (1966).

Interest of the *Amici*

We respectfully refer the Court to the preceding motion for leave to file this brief wherein the interest of the American Civil Liberties Union as *amici curiae* is set forth at length.

ARGUMENT

I.

The *nol. pros.* with leave, giving the solicitor the naked power to suspend a criminal prosecution or to reinstitute said prosecution at any time thereafter, denies petitioner his right to a speedy trial of the charges pending against him in violation of the Sixth Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution.

a. The *Nol. Pros.* With Leave: Its Nature and Its Use.

North Carolina G. S. 15-175 is the State's *nol. pros.* statute. However, it is not clear either from the record or from the opinion of the North Carolina Supreme Court, whether the State, in petitioner's case, invoked this statute or some common law legacy. In either case, the effect is the same. As judicially interpreted, this procedure gives local solicitors, on behalf of the State, practically unlimited power to determine the disposition and course of pending

criminal prosecutions. Once an indictment has issued, the solicitor has the authority to move for the entry of *nol. pros.* with leave, without any showing of cause. Upon the granting of the motion by the Court, the solicitor then is empowered either to forestall trial of the cause for however long he wishes or to reinstitute prosecution at any time thereafter. No standards are imposed upon his discretion either by statute or by case law. *State* v. *Thompson*, 10 N. C. 613 (1825); *State* v. *Buchanen*, 23 N. C. 59 (1840); *State* v. *Thornton*, 35 N. C. 258 (1852); *State* v. *Moody*, 69 N. C. 529 (1893); *State* v. *Furmage*, 250 N. C. 623, 109 S. E. 2d 563 (1959). The solicitor is equally free, once *nol. pros.* with leave has been entered, to reinstitute the prosecution. He does not have to show cause; he need only apply to the clerk of the court to have a capias issued as a matter of right. *Wilkinson* v. *Wilkinson*, 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912); *State* v. *Klopfer*, 145 S. E. 2d 909, 910 (1966). Whichever course the solicitor chooses to pursue, his will is the moving force.

If the solicitor reinstitutes prosecution of a trial that has been halted under the *nol. pros.* with leave procedure, he may do so at any time, however remote from the date of the indictment, without running afoul the two year statute of limitations generally applicable to misdemeanors. N. C. Gen. Stat. 15-1. When an indictment first issues, the statute of limitations stops running. It does not begin running again when the *nol. pros.* with leave is entered, but remains suspended indefinitely. *State* v. *Williams*, 151 N. C. 660, 65 S. E. 908 (1909).

Not only does the *nol. pros.* with leave procedure enable the solicitor to delay or bar prosecution indefinitely, but

the criminal defendant, under indictment for a misdemeanor, is without means to bring his cause to trial to secure his opportunity for exoneration. Unlike the solicitor, he cannot set his case for trial. Nor can he find antidotal relief in either the Constitution or General Statutes of North Carolina. Once the solicitor has suspended the trial by taking a *nol. pros.* with leave, the defendant is without hope of a speedy trial unless the solicitor promptly changes his mind and decides to reinstate the prosecution. The fortune of the defendant thus rests entirely with the will of the solicitor.

A number of jurisdictions have acknowledged the threats to the fair administration of justice inherent in such procedure as that followed in this case. Forty-three states afford the criminal defendant constitutional guarantee of a speedy trial in all criminal prosecutions. See Appendix 1, 2, post. In addition, nine states guarantee this right by statute. See Appendix 4, post. Beyond these general and only partly efficacious provisions, approximately one-third of the states also have seen fit altogether to abolish *nol. pros.* expressly by statute, or have greatly reduced its entry by the prosecution. See Appendix 5, post. Several states have placed the sole power for its entry in the court. See Appendix 6, post.

North Carolina has no guarantee of a speedy trial in its constitution. And even though it has some language to the effect that justice shall be administered " . . . without sale, denial, or delay," N. C. Const. art. 1, §35, this language has never been interpreted by its courts to require a prosecutor to indicate why *nol. pros.* with leave would not deny or delay justice in a particular case. See Appendix 3, post. It has never been used to limit the use of *nol. pros.* with leave. The

only meaningful protection against delay that North Carolina affords its criminally accused is found in N. C. Gen. Stat. 15-10, applicable only to incarcerated felons. See Appendix 4, post. The State offers no relief from delay, however unreasonable, to one who has been indicted for a misdemeanor.

Such a condition of state law exerts very forceful pressure upon every criminal defendant in a misdemeanor prosecution who would otherwise plead "not guilty" and immediately join issue, knowing full well that whatever the outcome he could eventually resume his normal life, free from anxiety and future jeopardy. But the defendant who must frame his plea under the threat that the prosecutor may indefinitely delay the trial of his cause through the discretionary *nol. pros.* with leave, lacks this measure of opportunity and security. Knowing that he has no assurance of a prompt trial and that he will be subject to prosecution at any time in the future, he is under extreme pressure to forgo his cause and to plead guilty. If the state's procedure cannot guarantee the security of a speedy trial, even upon minimum standards of promptness, and in its stead vests such power in the solicitor as does the *nol. pros.* with leave procedure, then the criminal defendant is simply deprived of his right to defend himself without jeopardizing his job, his family, his standing, and reputation in the community.

This is the plight of petitioner who has been two years under indictment. He remains "neither innocent nor guilty," but without doubt, to all the community, accused and indicted. The solicitor has denied Professor Klopfer a speedy trial upon the charges—an opportunity to establish his innocence, to recover his dignity and to be free of the specter

of future prosecution. The solicitor has greatly interfered with petitioner's ability to schedule lecture and speaking tours outside North Carolina in his capacity as Professor of Zoology at Duke University. He has, in effect, snared Professor Klopfer in a web of uncertainty. Of only one thing can petitioner now be sure: he will remain in jeopardy for the rest of his life, subject indefinitely to the power of the solicitor or his successors to reinstate prosecution.

b. The Right to a Speedy Trial: History and Policy Considerations.

The right to a speedy trial is of long standing. Its basic nature is disclosed by its deep roots in the early common law. It was first given effect in the Magna Carta where it was written "To no one will we sell, to no one deny or delay, right or justice." This provision was subsequently implemented by special writs of jail delivery and later by commissions of jail delivery under which special judges emptied the jails twice each year and either convicted and punished the prisoners or set them free. II Coke Inst. 43. In 1679 Parliament passed the Habeas Corpus Act, 31 Car. II, Ch. 2, which required that prisoners indicted for treason or felony be tried at the next sessions or be released on bail. That Act, which Blackstone called "the Bulwark of the British Constitution", 4 Commentaries 438, was still cherished by the British people at the time our Constitution was adopted, Hale's History of the Common Law, p. 87 et seq (5th ed.) and by American patriots and lawyers nurtured on Blackstone. Some believed that the right to a speedy trial and other similar rights were so clearly a part of our "liberty" that no Bill of Rights was neces-

sary. THE FEDERALIST, No. 84. But to be sure that these and other fundamental rights would be preserved to the People, the first nine Amendments were added to the Constitution; and the right to a speedy trial was given first place among the rights in the Sixth Amendment. In time, most of the states adopted the language or policy of the Sixth Amendment into their own constitutional or statutory schemes. See Appendix, 1, 2, 4, post.

The policies underlying the right to a speedy trial are now, as they were in Blackstone's England, the embodiment of realistic concern for the rights of the accused in a free society. This policy has two equally significant aspects: the desire to protect the individual from the indignity, harassment and anxiety of an unresolved arrest and indictment, *Ex parte Pickerill*, 44 F. Supp. 741, 742 (N. D. Tex. 1942); and the grave concern that the individual, because of delay, will be denied the fair administration of justice. This latter aspect of the policy recognizes that the value of a speedy trial is that it best preserves to the defendant the means of proving his case. *United States* v. *Ewell*, 86 S. Ct. 773, 776 (1966); *Fouts* v. *United States*, 253 F. 2d 215, 217 (6th Cir. 1958); *United States* v. *Chase*, 135 F. Supp. 230, 232 (E. D. Ill. 1955).

In its concern for the accused as an individual, the policy is not narrow. When a defendant pleads that he has been denied a speedy trial, it is not necessary for him to stipulate that he is incarcerated or even that he has been or will be demonstrably prejudiced by the delay. *United States* v. *Lustman*, 258 F. 2d 475, 477 (2d Cir. 1958), cert. denied 358 U. S. 880 (1958); *Ex Parte Pickerill*, 44 F. Supp. 741, 742 (N. D. Tex. 1942). But this is not to say that one is less subject to the disabilities attending a long delay merely

because he is not held in custody. Of equal importance is the fact that he is subject to anxiety and concern over the possible disposition of the indictment pending against him, and that he must indefinitely continue to entertain grave doubts about his future security. To require that the defendant be incarcerated to raise the issue of delay would place an intolerable burden upon the exercise of a constitutional right and would undermine its several policies.

The importance of the speedy trial of criminal offenses in a democratic society derives not only from its need to protect the accused, but equally to protect the public order. The societal interest in security demands speedy trial, for this facilitates both effective prosecution of criminals and greater deterrence to potential criminals.

c. The Right to a Speedy Trial: Its Application to the States Through the Fourteenth Amendment.

Federal courts have sometimes suggested that the Sixth Amendment guarantee to a speedy trial is not directly or fully applicable to the states through the Due Process Clause of the Fourteenth Amendment. *In re Sawyer's Petition*, 229 F. 2d 805, 812 (7th Cir. 1956). This does not mean, however, that the state defendant is entirely without the equivalent of specific Sixth Amendment protection. Language bearing upon this issue points up that the Fourteenth Amendment protects the state defendant against the denial of a speedy trial to the extent that such denial is inconsistent with fundamental due process. *Mattoon* v. *Rhay*, 313 F. 2d 683, 684-685 (9th Cir. 1963); *Odell* v. *Burke*, 281 F. 2d 782, 787 (7th Cir. 1960); *Hastings* v. *McLeod*, 261 F. 2d 627 (9th Cir. 1958) (per curiam); *New York* v. *Fay*, 215 F. Supp. 653, 655 (S. D. N. Y. 1963);

Gordon v. *Overlade*, 135 F. Supp. 577, 578 (N. D. Ind. 1958). In recent years, the Supreme Court, demonstrating forthright concern for the rights of the accused, has broadened that understanding of due process. To that end the Court has brought within the scope of Fourteenth Amendment protection those safeguards in the first nine Amendments fundamental to ". . . the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937). Speaking for the Court in *Gideon* v. *Wainwright*, 372 U. S. 335, 341 (1963), Mr. Justice Black has pointed out that there are ". . . ample precedents for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." The Court has more recently sharpened this point, emphasizing that ". . . since [*Gideon*] it no longer can broadly be said that the Sixth Amendment does not apply to state courts." *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965). To remove any doubts about where the Court stands on this issue, it has observed: ". . . [i]n the light of *Gideon*, *Malloy* [*Malloy* v. *Hogan*, 378 U.S. 1 (1964)], and other cases cited in these opinions . . . the statements made . . . that "the Sixth Amendment does not apply to the states *can no longer be regarded as the law*" [emphasis added]. *Pointer* v. *Texas*, 380 U. S. 400, 406 (1964),

The thrust of *Gideon*, *Malloy*, *Pointer* and similar recent cases has been to assure the accused a fundamentally fair trial in the state courts by incorporating into the Fourteenth Amendment Due Process Clause those safeguards in the Bill of Rights essential to the fair protection of the criminally accused. *Jackson* v. *Denno*, 378 U. S. 368

(1964); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). This protection is subverted and undermined if a state may indefinitely delay any trial without reason, until the efficacy of the accused's defense has been debilitated by the ravages of time and he has been obliquely punished by the stigma of his arrest and indictment. Such deliberate procrastination undercuts the possibility of having a fair trial, having repose from the threat of prosecution, and having an opportunity for exoneration.

The *nol. pros.* with leave procedure, which in practice and in this case grants the solicitor the unfettered power to delay a trial indefinitely, and which, in fact, has permitted the delay of petitioner's trial for two years, will not wash in the wake of standards of fundamental fairness. Due process demands that every accused have a fair trial, which necessitates, as a minimum, as prompt a trial as the fair administration of justice will allow. *Shepard* v. *United States*, 163 F. 2d 974, 976 (8th Cir. 1947). Time does not recognize jurisdictional boundaries. Wherever the situs, the ingredients of a fair trial blend in the same way. Unreasonable delay is inimical to the rights of the accused wherever the forum. *United States* v. *McWilliams*, 69 F. Supp. 812, 814 (D. D. C. 1946); *United States* v. *Fay*, 313 F. 2d 620, 623 (2d Cir. 1963); *State of Maryland* v. *Kurek*, 233 F. Supp. 431, 432 (D. Md. 1964).

Four factors have generally been regarded as relevant in determining whether the denial of a speedy trial has assumed due process proportions: the length of the delay; the reason for the delay; the prejudice to the accused; and waiver by the accused. *United States* v. *Simmons*, 338 F. 2d 804, 807 (2d Cir. 1964).

In the instant case, approximately two years have elapsed since the indictment issued against petitioner. So far as the *nol. pros.* with leave procedure is concerned, it may continue indefinitely—entirely at the discretion of the solicitor. *Wilkinson* v. *Wilkinson*, 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912).

The State failed to suggest any reason for further delay of the trial, at the time it took advantage of the availability of the *nol. pros.* with leave. In view of the fact that one trial on the indictment had already been completed, that the alleged incident had occurred locally, that the witnesses were few in number and close at hand, it is not surprising that the solicitor offered no reason to continue this proceeding. Indeed, the North Carolina Supreme Court has been able to speculate that perhaps the solicitor desired to continue the case because he "may have concluded that another go at it *would not be worth the time and expense of another effort*" [emphasis added]. *State* v. *Klopfer*, 145 S. E. 2d 909, 910 (1966). This, however, far from excusing further delay by the solicitor tends only to suggest that the prosecution should have been dismissed.

There is no way fully to measure the prejudice sustained by Professor Klopfer, whether in terms of lost ability adequately to defend himself, personal anxiety respecting the specter of future prosecution, community stigma from an arrest and indictment he has had no reasonable chance to remove, or prejudice to his career. All that can be said with certainty is that the prejudice will increase with the passing of time, exactly as the solicitor's justification for delay has become even less convincing as time has passed.

Petitioner did not waive his right to a speedy trial. The record demonstrates that petitioner, through his counsel, made timely objection and took exception to the entry of *nol. pros.* with leave (R. 11-12).

Viewed alone, any one of these factors might not amount to unreasonable delay. But as an aggregate, they easily reach due process dimensions.

II.

The *nol. pros.* with leave violates due process in operating to punish the petitioner in the absence of a fundamentally fair trial.

Due process requires not merely that criminal trials must be conducted free of fundamental error, but that the accused must be given a reasonable opportunity to end the stigma and disabilities of arrest and indictment by establishing his innocence. Due process assures the accused the affirmative right to have a fair trial take place. It is obvious that the significant right to establish one's innocence may be eroded in direct proportion to the lapse of time between his arrest and his trial. Just as the ravages of time adversely affect the availability of the State's evidence and the State's witnesses against him, so they equally affect his ability to secure exoneration against the criminal charge as well as against the prospect of conviction. After sufficient time has gone by to enable the accused and the State to prepare for trial, further delay operates to their mutual disadvantage by atrophy of their evidence. The result is to increase the likelihood that no meaningful trial can be held and, correspondingly, that the accused will have to live out his life subjected to the dis-

abilities of an unresolved record of criminal arrest and indictment. Without the aid of this Court, petitioner is virtually certain to endure such oblique punishment. He has no means pursuant to any procedure in North Carolina either to bring his case to trial or to secure a dismissal of the indictment. No remedy exists to offset the solicitor's discretion to delay the trial indefinitely. Beyond that, the solicitor has failed to suggest any reason why further delay beyond two years is necessary or even consistent with any desire by him to prosecute the case. And beyond this, it is clear that but for the prosecution's power to hold the accused in limbo for the rest of his life, the accused would in fact already have been vindicated at law.

Petitioner was indicted for criminal trespass for having peacefully sought service in a place of public accommodation plainly within the meaning of the Civil Rights Act of 1964. 78 Stat. 241, Tit. II, §201(b)(2). Pursuant to this Court's decision in *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964), he could not now be convicted of the offense for which he stands accused and indicted. The *Hamm* decision, moreover, occurred before the solicitor obtained a *nol. pros.* with leave in this case. It was therefore clear at the time not only that no additional time was required to prepare adequately the prosecution of this case which had already been tried once (before the *Hamm* decision), but that no subsequent prosecution could succeed. The effect of the *nol. pros.* with leave is therefore not only to deprive the accused of his opportunity to establish his innocence and to resolve the record of his arrest and indictment, but to deprive him of the certainty of vindication. The net effect of the proceedings below is to punish the petitioner

subliminally through the expedient of an unresolved record of arrest and indictment which he must carry with him for the rest of his life, unless this Court acts.

III.

The *nol. pros.* with leave, granted without reason in this case, represents a continuing *in terrorem* deterrent to the exercise of constitutionally protected rights of speech, assembly, association, and equal protection in North Carolina.

It is no secret that expressions in opposition to racial discrimination are unpopular with much of the white citizenry of the South. North Carolina makes it very easy for its local solicitor to discourage such expression. It has armed him with the discretionary *nol. pros.* with leave, thus empowering the solicitor to suspend indefinitely the trial of one who, such as Professor Klopfer, has been arrested and indicted while engaging in a locally unpopular, though constitutionally protected, form of conduct. The State also has empowered its solicitor, through this same procedure, to cause the protestant to be again arrested upon the same indictment as often as the solicitor wills, each time putting the accused to the burden of arranging bond and preparing his defense. It is not difficult to foresee that if petitioner again engages in a racial protest or, for that matter, in any form of expression or conduct disapproved of by the State or the solicitor, he might well be re-arrested upon the indictment now pending, once, twice, or many times, and gravely inconvenienced and embarrassed.

In light of Professor Klopfer's position as a member of a university faculty, such harassment would present a grave threat, jeopardizing his career as well as his standing and reputation in the community. The effect, therefore, is to force petitioner to choose between his career and effectively expressing his dissatisfaction with racial segregation. Neither the State nor its solicitor has the right to force so unconscionable a choice on one who would otherwise engage in a form of unpopular expression, unless the State can demonstrate some overriding, compelling interest. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U. S. 516 (1960). North Carolina's solicitor has failed in petitioner's case to show any State interest to be preserved by permitting petitioner's indictment to continue. It is especially doubtful in light of the effect that *Hamm* and the Civil Rights Act of 1964 would have upon a conviction that any reason to continue the indictment exists other than the deterrent effect it is bound to have upon petitioner's future conduct.

To the extent that the *nol. pros.* with leave empowers the solicitor to deter petitioner from again engaging in a racial protest, this procedure does not pass constitutional muster. If petitioner is ever again to feel free to express an unpopular belief in North Carolina, the indictment pending against him must be dismissed.

CONCLUSION

To safeguard petitioner's right to a fair and speedy trial as well as his right to express unpopular beliefs, this Court should grant the petition for certiorari and dismiss the indictment pending against petitioner pursuant to the discretionary *nol. pros.* with leave.

Respectfully Submitted,

WILLIAM W. VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

Attorneys for Amici

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The attorneys for *amici* acknowledge the invaluable assistance of Mr. Steven Roth, a student at the Duke Law School.

APPENDIX

1. Thirty-eight constitutions provide, like the Sixth Amendment, that the accused shall enjoy the right to a speedy and public trial in all criminal prosecutions.

   Ala. Const. art. 1, §6; Alaska Const. art. 1, §11; Ariz. Const. art. 2, §24; Ark. Const. art. 2, §10; Cal. Const. art. 1, §13; Colo. Const. art. II, sec. 16; Conn. Const. art. 1, §9; Del. Const. art. 1, §7; Fla. Const. DR sec. 11; Ga. Const. art. 1, §2-105; Idaho Const. art. 1, §13; Ill. Const. art. 2, §9; Iowa Const. art. 1, §10; Kan. Const. B. of R., §10; Ky. Const. §11; La. Const. art. 1, §9; Me. Const. art. 1, §6; Md. Const. D. R. art. 21; Mich. Const. 1963 art. 1, §20; Minn. Const. art. 1, §6; Miss. Const. art. 3, §26; Mo. Const. art. 1, §18(a); Mont. Const. art. 3, §15; Neb. Const. art. 1, §11; N. J. Const. art. 1, par. 10; N. D. Const. art. 1, §13; Ohio Const. art. 1, §10; Okla. Const. art. 2, §20; Pa. Const. art. 1, §9; R. I. Const. art. 1, §10; S. C. Const. art. 1, §18; Tenn. Const. art. 1, §9; Tex. Const. art. 1, §10; Utah Const. art. 1, §12; Va. Const. art. 1, §8; Vt. Const. ch. I, art. 10; Wis. Const. art. 1, §7; Wyo. Const. art. 1, §10.

2. Six constitutions, not specifically guaranteeing the accused a speedy and public trial, state that justice shall be administered speedily and without delay. This, too, has been construed to afford the accused the right to a speedy trial.

   Ariz. Const. art. 2, §11 (But see appendix 1, supra); Ind. Const. art. 1, §12; Kan. Const. B. of R., §18 (But see Appendix 1, supra); Ore. Const. art. 1, §10; Wash. Const. art. 1, §10; W. Va. Const. art. III, §14.

3. Six states have no constitutional guarantee of a speedy trial.

Hawaii, Massachusetts, Nevada, New Hampshire, New York, North Carolina.

Three of these states have language in their constitutions similar to that of the Indiana constitution. (Appendix 2, Supra). Mass. Const. pt. 1, Art. XH, §12; N. H. Const. pt. 1, art. 14; N. C. Const. art. 1, §35. But thus far there have been no judicial decisions interpreting this to guarantee the right to a speedy trial.

4. Eleven states provide by statute that the accused shall enjoy the right to a speedy trial.

Ariz. Rev. Stat. Ann. art. 3, §13-161; Ark. Stat. Ann. tit. 43, §1703; Ga. Code Ann. ch. 27-6, §21-601; Idaho Code tit. 19, §3501; Ill. Rev. Stat. 1965 tit. 28, §103-5; Kan. Stat. Ann. §62-1431 et. seq.; Ann. Laws of Mass. tit. 277, §72; Mo. Stat. Ann. §545.890; Nev. Rev. Stat. §169.160; N. C. Gen. Stat. 15-10 (applying to felony offenses only); Okla. Stat. Ann. tit. 22, §13; Code of Law of S. C. tit. 17, §509 (felony); §510 (misdemeanor).

5. Approximately one-third of the States have abolished *nol. pros.* expressly by statute or have greatly restricted its entry by the prosecutor.

Cal. Pen. Code §1386; Idaho Code Ann. §19-3505; Iowa Code §795-5 (by implication); Minn. Stat. §631.21 (by implication); Mont. Rev. Code Ann. §94-9506; Nev. Comp. Laws Ann. §11198; N. Y. Crim.

Code §672; N. D. Rev. Code §29-1805; Okla. Stat. tit. 22, §816; Ore. Comp. Laws Ann. §26-2006; S. D. Com. Laws Ann. §4811; Utah Code Ann. §105-51-5; Wash. Rev. Stat. Ann. §14-2314 (by implication).

6. Thirteen States have placed sole discretion for the entry of *nol. pros.* in the court.

Ala. Code Ann. tit. 15, §257; Ark. Ann. Stat. §43-1230; Colo. Stat. Ann. c. 48 §463; Ga. Code Ann. §27-1801; Ind. Ann. Stat. 9-910; Ky. Rev. Stat. 455.070; Me. Rev. Stat. c. 79 §135; Mich. Comp. Laws §767. 29; Miss. Code Ann. §2566; Ohio Gen. Code Ann. §13437-32; Pa. Stat. Ann. tit. 19, §492; Tex. Stat., Code of Crim. Proc. art. 577; Wyo. Comp. Stat. Ann. §10-823.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 100

PETER H. KLOPFER, *Petitioner*

vs.

STATE OF NORTH CAROLINA, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR THE PETITIONER

WADE H. PENNY, JR.
P. O. Box 522
Durham, North Carolina 27702
Counsel for Petitioner

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CITATION TO OPINION

The opinion of the Supreme Court of North Carolina (R. 15-17.) is reported at 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on January 14, 1966 (R. 17-18.). The petition for a writ of certiorari was filed on April 14, 1966, and was granted on May 31, 1966 (R. 19.). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3) since the issue raised is that of a denial by the State of a right conferred upon the petitioner by the Constitution of the United States.

QUESTION PRESENTED

In a State criminal prosecution, does the State deny to the accused the Constitutional right to a fair and speedy trial by procedurally suspending the prosecution indefinitely over the objection of the accused and without showing any justification for suspending the prosecution indefinitely?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1.) Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2.) Fourteenth Amendment to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

On February 24, 1964, the Grand Jury for the County of Orange, State of North Carolina, returned a Bill of Indictment charging the petitioner, Peter H. Klopfer, with the criminal offense of trespass in violation of N. C. Gen. Stat. 14-134. (R. 2-3, 7-8.)

In March, 1964, Klopfer's case was brought to trial in the course of a three week Special Criminal Session of the Superior Court of Orange County. Klopfer entered a plea of "Not Guilty" to the offense charged. After due deliberation upon all the evidence, argument of counsel and the Court's charge, the jury was unable to agree upon a verdict. The Court thereupon withdrew a juror and entered an order of mistrial with Klopfer being directed to reappear in court for trial on the following Monday. However, Klopfer's case was not retried at that session of court. (R. 3-5, 8.)

Several weeks prior to the April 1965 Criminal Session of the Superior Court of Orange County, the Solicitor indicated to Klopfer's attorney his intention to have a *nolle prosequi* with leave entered in Klopfer's case. At the April 1965 Criminal Session of the Superior Court of Orange County, Klopfer, through his attorney in open court, opposed the entry of a *nolle prosequi* with leave. Klopfer's contention at that time was that the trespass charge was abated on the authority of *Hamm* v. *City of Rock Hill* 379 U. S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964). The Court indicated it approved the entry of a *nolle prosequi* with leave in Klopfer's case. The Solicitor then stated he did not desire now to take a *nolle prosequi* with leave in Klopfer's case and wanted to retain the case in its trial docket status. Klopfer's case was continued for the term at that time. (R. 5, 9.)

The trial calendar for the next criminal session of the Superior Court of Orange County in August, 1965, did not list Klopfer's case for trial. To ascertain the trial status of Klopfer's case, a motion was filed expressing Klopfer's desire to have the trespass charge pending against him permanently concluded as soon as reasonably possible in accordance with the applicable laws of the State of North Carolina and of the United States. Noting that some eighteen months had elapsed since Klopfer's being indicted, the motion requested the Court to inquire into the trial status of the charge pending against Klopfer and to ascertain when his case would be brought to trial. (R. 9-12.)

In his motion to secure a prompt trial, Klopfer, a professor of zoology at Duke University, alleged that the offense of trespass with which he was charged resulted from the attempt by him along with other persons to obtain service at a restaurant which was a "place of public accommodation" within the meaning of the Civil Rights Act of 1964. The motion cited *Hamm* v. *City of Rock Hill* 379 U. S. 306 (1964) for its holding that the Civil Rights Act of 1964 has retroactive effect so as to bar pending prosecutions of persons who, prior to passage of the Act, sought nondiscriminatory service at a "place of public accommodation". The motion contended the prosecution for trespass pending against Klopfer was barred and abated by *Hamm* v. *City of Rock Hill,* supra, with particular reference being made to the application of the *Hamm* ruling in the case of *Blow* v. *North Carolina* 379 U. S. 684, 85 S. Ct. 635 (1965). (R. 10-11.)

In response to the foregoing motion, the status of Klopfer's case was considered in open court on Monday, August 9, 1965, at the August 1965 Criminal Session of the Superior Court of Orange County. The Solicitor then moved the Court that the State be allowed to take a *nolle prosequi* with leave in Klopfer's case. The motion was allowed by the Court. The defendant objected and took exception to the entry of the *nolle prosequi* with leave. (R. 12.)

On appeal to the Supreme Court of North Carolina, the entry of *nolle prosequi* with leave in Klopfer's case was affirmed with the holding that indefinite suspension of the prosecution does not violate Klopfer's constitutional right to a speedy trial. (R. 15-17.)

SUMMARY OF ARGUMENT

a. Under North Carolina criminal procedure, an entry of *nolle prosequi* allows a case to be replaced on the trial docket by the Solicitor only with the consent of the court; but an entry of *nolle prosequi* with leave implies the consent of the court, and the Solicitor may have the case restored for trial at any time in his discretion without further order. In the *Klopfer* case, one trial was had on the criminal charge of trespass and the jury was unable to agree. Some sixteen months thereafter the Solicitor took a *nolle prosequi* with leave over Klopfer's objection. The North Carolina Supreme Court held that Klopfer has no grounds to complain that the *nolle prosequi* with leave deprives him of his constitutional right to a speedy trial, since an accused has no right to compel the State to give him his day in court if the State elects not to do so.

b. As a vital concern of society, the right to prompt administration of justice draws express endorsement in English legal history at least as far back as Magna Carta. The inclusion of the right to a speedy trial as the first procedural guarantee of the Sixth Amendment is persuasive evidence of the unanimity with which this right has historically been regarded as a fundamental standard of due process.

c. Previous decisions of this Court have defined the scope of the Due Process Clause of the Fourteenth Amendment to include most of the basic procedural safeguards of the Sixth Amendment. See especially *In Re Oliver*, 333 U. S. 257 (1948) (right to a public trial); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to assistance of counsel); and *Pointer* v. *Texas*, 380 U. S. 400 (1965) (right to confrontation of witnesses). The vital interests of an accused safeguarded by the right to a speedy trial are identical

to some, and inextricably related to all the interests of an accused now protected by the Due Process Clause of the Fourteenth Amendment. Without question the Sixth Amendment right to a speedy trial is of such fundamental nature as to be an essential of due process and binding upon the States.

d. The effect of the holding in the *Klopfer* case is to deny to Klopfer forever his day in court. This ruling subjects Klopfer to the very evils against which the right to a speedy trial safeguards an accused. Unreasonable delay being a violation of the right to a speedy trial, it necessarily follows that absolute denial of trial to an accused, as with Klopfer, constitutes an emasculation of the right to a speedy trial.

ARGUMENT

North Carolina's nolle prosequi with leave procedure which permits the State, over the objection of the petitioner, to delay forever the petitioner's having his day in court denies the petitioner his right to a speedy trial in violation of the Sixth Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution.

a. North Carolina's Nolle Prosequi with leave; the Solicitor's Prerogative and the Defendant's Predicament.

Full appreciation of the predicament confronting the petitioner, Klopfer, requires an understanding of the legal characteristics and effect of the *nolle prosequi* with leave entry in North Carolina criminal procedure.

Under North Carolina law, the procedural devices of *nolle prosequi* and *nolle prosequi* with leave[1] are closely related and a discussion of the one often necessitates reference to the other. *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 74 S.E. 740 (1912); *State* v. *Klopfer,* 266 N. C. 349, 145 S.E. 2d 909 (1966).

1. In actual practice the terms, *"nolle prosequi"* and *"nolle prosequi* with leave", are respectively abbreviated to read *"nol. pros."* and *"nol. pros.* with leave".

The immediate legal effect of an entry of *nolle prosequi* or *nolle prosequi* with leave has been summarized by the North Carolina Supreme Court as follows:

> "A *nol. pros.* in criminal proceedings is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time. . . ; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he may be tried upon it."
> *State* v. *Thornton* 35 N. C. 256, 257-258 (1852)
> Also see: *Wilkinson* v. *Wilkinson* 159 N. C. 265, 74 S.E. 740 (1912).

The sole distinction between *nolle prosequi* and *nolle prosequi* with leave relates to the procedure by which the State may resume prosecution of a defendant in whose case a *nolle prosequi* or *nolle prosequi* with leave has been previously entered. This distinction is succinctly stated in the *Klopfer* case as follows:

> "When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application. When a *nolle prosequi with leave* is entered, the consent of the court is implied in the order and the solicitor (without further order) may have the case restored for trial."
> *State* v. *Klopfer* 266 N. C. 349, 350, 145 S.E. 2d 909, 910 (1966).

In the case of a prior entry of *nolle prosequi* with leave, the Solicitor may resume prosecution of the defendant simply by requesting the clerk to issue a *capias* for the defendant. *Wilkinson* v. *Wilkinson* 159 N. C. 265, 74 S.E. 740 (1912).

In general terms, the North Carolina Supreme Court has observed that the *nolle prosequi* procedure is part of the court process appropriately used to help "bring offenders to trial and justice". *State* v. *Smith* 129 N. C. 546, 548, 40 S.E. 1 (1901). The sole statutorily prescribed use of the *nolle prosequi* procedure is contained in N. C. Gen. Stat. 15-175 which is basically administrative[2] in nature and not related to the circumstances of the *Klopfer* case. The *nolle prosequi* or *nolle prosequi* with leave entry is most frequently used in criminal prosecutions where the State desires to defer trial because the evidence available to the State is insufficient to support a conviction. *State* v. *Furmage* 250 N. C. 616, 622, 109 S.E. 2d 563, 568 (1959).

Although entry of *nolle prosequi* or *nolle prosequi* with leave is ultimately within the control of the court, the decision to make such entry is customarily and properly left in the discretion of the Solicitor. *State* v. *Moody* 69 N. C. 529 (1873). The wide latitude allowed by the trial courts to the prosecuting officer in exercising the discretionary *nolle prosequi* power is plainly intimated in the early case of *State* v. *Thompson,* as follows:

> ". . . the Attorney General has a discretionary power to enter a *nolle prosequi,* for the proper exercise of which he is responsible. We know of no case where the court has interfered with the exercise of this power, though they certainly would do so if it were oppressively used." *State* v. *Thompson* 10 N. C. 613, 614 (1825).

Exhibiting an awareness evidently not applied in Klopfer's case, the North Carolina Supreme Court has repeated-

2. N. C. Gen. Stat. 15-175 provides that a *nolle prosequi* with leave shall be entered in all criminal actions as to which the indictment has been pending for two terms of court and the accused has not been apprehended. In such cases, the Clerk of Superior Court is empowered to issue a *capias* for the defendant without the necessity of a request from the Solicitor when the Clerk has reasonable grounds to believe the defendant may be arrested. This statute enables police officers to quickly obtain a capias for the arrest of a long sought defendant without first having to locate the Solicitor who may be in another county of the Solicitorial District.

ly recognized that the discretionary *nolle prosequi* power has the clear potentiality for abuse by the Solicitor resulting in oppression and harassment of the accused. *State* v. *Thornton*, 35 N. C. 256 (1852); *State* v. *Smith*, 129 N. C. 546, 40 S.E. 1 (1901); *Wilkinson* v. *Wilkinson*, 159 N. C. 265, 74 S.E. 740 (1912). However, in the case of an entry of *nolle prosequi* the North Carolina Supreme Court feels the possibility of abuse is restrained and minimized through the necessity of court approval before a *capias* may issue for the accused. *Wilkinson* v. *Wilkinson, supra.*

No opinion has yet been rendered by the Supreme Court of North Carolina imposing any specific standard by which one may determine what constitutes the proper exercise of the *nolle prosequi* power. The universal practice in North Carolina is for the Solicitor to make an entry of *"nol. pros."* or *"nol. pros.* with leave" without any statement as to the circumstances thereof or a justification for said entry. *State* v. *Smith*, 129 N. C. 546, 40 S.E. 1 (1901). This practice is confirmed by the record reported as before the State Supreme Court in the *nolle prosequi* cases cited herein such as *State* v. *Williams*, 151 N. C. 660, 65 S.E. 908 (1909); *State* v. *Smith*, 170 N. C. 742, 87 S.E. 98 (1915). Indeed, the North Carolina Supreme Court has never stated nor implied that an explanation of the circumstances or any justification need be given by the Solicitor in connection with an entry of *nolle prosequi* or *nolle prosequi* with leave. Referring to the entry of *nolle prosequi* with leave, the North Carolina Supreme Court has stated:

> "If the [trial] Court thinks proper to grant such leave at the time the *nol. pros.* is entered, we do not see why it may not do so; and we do not feel like reversing a practice so universally adopted in the State." *State* v. *Smith*, 129 N. C. 546, 548, 40 S.E. 1, 1-2 (1901).

North Carolina Gen. Stat. 15-1 provides for a two-year statute of limitations within which to institute criminal prosecutions for most misdemeanors[3]. The trespass offense

3. N. C. Gen. Stat. 15-1 applies to all misdemeanors except those as to which malice is an element of the offense. Malice is not an element of the misdemeanor offense of trespass as defined in N. C. Gen. Stat. 14-134. Therefore, the two-year statute of limitations under N. C. Gen. Stat. 15-1 applies to trespass charges under N. C. Gen. Stat. 14-134.

with which Klopfer is charged under N. C. Gen. Stat. 14-134[4] is a misdemeanor to which N. C. Gen. Stat. 15-1 applies. It is a basic rule that the return of a bill of indictment charging a misdemeanor arrests the running of the statute of limitations. Of particular relevance to the situation confronting Klopfer is the rule in North Carolina that the entry of *nolle prosequi* with leave in a misdemeanor case does not start the statute of limitations running again. *State* v. *Williams,* 151 N. C. 660, 65 S.E. 908 (1909). Therefore, under a *nolle prosequi* with leave entry, prosecution may be resumed on the pending bill of indictment after greatly prolonged delay and unaffected by any statute of limitations.

The foregoing discussion impels the conclusion that in North Carolina an entry of *nolle prosequi* with leave in a criminal prosecution secures to a Solicitor the virtually unbridled prerogative to postpone trial of a criminal charge indefinitely. In effect, the *Klopfer* case (R. 15-17.) now permits a Solicitor by entry of *nolle prosequi* with leave to permanently deny to a defendant the opportunity of exoneration by a public trial.

Klopfer's predicament results from the holding in his case that, irrespective of the past and prospective delay involved, the entry of *nolle prosequi* with leave deprives a defendant of the right to ever compel the State to give him a trial. (R. 15-17.) Under North Carolina law, Klopfer now has no other recourse by which to secure trial and obtain a determination of his guilt or innocence.

b. The Right to a Speedy Trial: Enacted in Magna Carta and Enshrined in the Bill of Rights.

Prompt administration of justice as an essential and preeminent right of the individual and obligation of government receives express endorsement in English law at least as early as Magna Carta. In the original issue of Magna Carta by King John in 1215, Chapter 40 in its entirety

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4. N. C. Gen. Stat. 14-134 makes it an offense of trespass to "go or enter upon the lands of another, without a license therefor" and "after being forbidden to do so." See: *Blow* v. *North Carolina,* 379 U. S. 684 (1965).

reads, "To no one will we sell, to no one will we deny, or delay right or justice." Chapter 39 is the most famous passage in Magna Carta with its provision that all criminal prosecutions instituted against a "freeman" shall adhere to the "law of the land". Modern scholars consider the "law of the land" provision in Magna Carta as the principal forerunner of the concept, "due process of law". It is significant that in the definitive reissue of Magna Carta by Henry III in 1225, Chapters 39 and 40 of the original Great Charter were combined and appear together as Chapter 29. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 241-243, 316-321 (1965). Ten of the thirty-seven chapters of the Great Charter of 1225, including the landmark Chapter 29, continue today as part of the modern British constitution. *Id.* at 242.

At the time of formulation of the Constitution of the United States, the heritage of common law safeguards of personal liberty was deeply engrained in American jurisprudence and emphatically proclaimed by the citizenry of this nation. Notwithstanding Hamilton's argument in THE FEDERALIST No. 84 that the addition of a bill of rights to the Constitution was unnecessary and possibly dangerous, the vocal sentiment of the public prevailed in favor of a specific enumeration of those rights deemed absolutely necessary to secure the blessings of liberty to each citizen. Among those basic procedural safeguards specifically guaranteed was the Sixth Amendment provision that an accused shall enjoy the right to a speedy and public trial in all criminal prosecutions.

The presentation in Congress of the proposed Bill of Rights resulted in a paucity of debate concerning the Amendments which detailed procedural safeguards such as the right to a speedy trial. This circumstance is sound evidence that a broad consensus existed within the nation as to what rights were supremely vital to assure liberty of the individual, and that among these rights was the right to a speedy trial. BRANT, THE BILL OF RIGHTS 223-225 (1965).

c. Due Process and the Sixth Amendment: Does the Constitutional Right to a Speedy Trial Apply to the States?

The decision of the North Carolina Supreme Court (R. 15-17), being here considered, permits the State, by utilization of the procedural device of a *nolle prosequi* with leave, to indefinitely suspend the prosecution of a trespass charge against Klopfer and, in effect, to permanently deprive Klopfer of having his day in court with the opportunity to exonerate himself. The *Klopfer* case poses to this Court for the first time the vital question: Does the Due Process Clause of the Fourteenth Amendment, with or without absorption of the Sixth Amendment guarantee of a speedy trial, secure to an accused the right to a speedy trial in all State criminal prosecutions? The answer is clearly in the affirmative by whatever line of reasoning employed.

As a general proposition, the Due Process Clause of the Fourteenth Amendment secures to each citizen in his relationship with the States those vital and fundamental safeguards "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937). Also see *Powell* v. *Alabama*, 287 U. S. 45 (1932).

In considering what procedural safeguards are implicit in the "concept of ordered liberty", this Court held in *In Re Oliver*, 333 U. S. 257 (1948) that due process under the Fourteenth Amendment requires that State prosecution of an accused be by public trial. Pointing to the vital protections afforded by the requirement of public trial in State criminal prosecutions, this Court observed:

> "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power". *In Re Oliver* 333 U. S. 257, 270 (1948).

It is self-evident that the right to public trial, with its safeguard of the individual against judicial abuse, is seriously undercut in State prosecutions if there be no corollary constitutional right to a speedy trial. Indeed, the imperative of protecting an accused from judicial harassment, intimidation and persecution, which makes the right to a public trial an essential of due process of law, justifies with equal force and validity the conclusion that the right to a speedy trial is likewise an essential of due process of law. The fundamental nature of the right to a speedy trial is confirmed in the *Oliver* case, with this statement:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; . . . ".
>
> *In Re Oliver,* 333 U. S. 257, 273 (1948).

Regarding the character and function of juries in State criminal prosecutions, this Court held in *Turner* v. *Louisiana,* 379 U. S. 466 (1965), that due process of law under the Fourteenth Amendment requires that jury trials in State criminal prosecutions must be by impartial juries.

In the Sixth Amendment, the first three rights secured to an accused are those of speedy trial, public trial and impartiality of the jury.

However, in neither *Oliver* (public trial) nor *Turner* (impartial jury), *supra,* did this Court base its holding on the rationale of incorporation of these specific Sixth Amendment guarantees into the Due Process Clause of the Fourteenth Amendment. Instead, this Court found the right to a public trial in *Oliver, supra,* and the right to an impartial jury in *Turner, supra,* to be so basic and essential as to be implicit in the concept of due process without reference to the Sixth Amendment.

The broadening of the Due Process Clause of the Fourteenth Amendment to encompass all the procedural safeguards of the Sixth Amendment was accelerated by the decision of *Gideon* v. *Wainwright,* 372 U. S. 335 in 1963. *Gideon* held that the Sixth Amendment's guarantee

of assistance of counsel is obligatory upon the States for the reason that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963). With *Pointer* v. *Texas*, 380 U. S. 400 (1965), this Court reaffirmed the *Gideon* approach by holding that the Due Process Clause of the Fourteenth Amendment also incorporates the Sixth Amendment right of confrontation. The inclusion of the Sixth Amendment guarantees in the Due Process Clause of the Fourteenth Amendment was confirmed by this Court in its declaring that:

> "In the light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law."
>
> *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965).

The right to a speedy trial has been characterized by this Court as "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself". *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). The right to a speedy trial also protects an accused from the State's using the threat of ill-founded, stale, or currently suspended prosecutions to intimidate him into foregoing the free exercise of First Amendment rights and other valued privileges of citizenship.

The vital interests of the individual safeguarded by the right to a speedy trial are clearly as essential to the "concept of ordered liberty" as are the Sixth Amendment rights to a public trial, to an impartial jury, to confrontation of witnesses and to assistance of counsel, which rights are within the scope of Fourteenth Amendment due process. In truth, virtually all the procedural rights encom-

passed in the Due Process Clause of the Fourteenth Amendment proceed from the assumption that an accused shall have his day in court with reasonable dispatch.

And by what conceivable manner of reasoning may the right to a speedy trial justifiably be disengaged from its eminent role in the Bill of Rights and logically repudiated as an essential of due process?

d. Indefinite Suspension of Prosecution over the Defendant's Objection: A Clear Denial of the Right to a Speedy Trial.

In blatant disregard of Klopfer's constitutional right to a speedy trial, the North Carolina Supreme Court in the *Klopfer* case (R. 15-17) took the unprecedented and incongruous position that criminal prosecution having been instituted against Klopfer, yet Klopfer may be denied forever his day in court by the arbitrary action of the Solicitor in entering a *nolle prosequi* with leave in Klopfer's case over Klopfer's objection.

The North Carolina Supreme Court stated its holding in the *Klopfer* case in the following terms and without any effort to analyze the relationship between North Carolina's *nolle prosequi* with leave practice and an accused's right to a speedy trial:

> "Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. . . . In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record." *State* v. *Klopfer,* (R. 15-17.)

As discussed previously, under North Carolina practice the entry of *nolle prosequi* with leave in a criminal prosecution leaves the time of future trial, if indeed there is to be a trial, entirely within the unrestricted discretion of the Solicitor. *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 74

S.E. 740 (1912); *State* v. *Klopfer,* (R. 15-17.) It is evident from the *Klopfer* decision (R. 15-17) that there is no statutory or constitutional provision in North Carolina which requires the Solicitor to ever bring Klopfer's case to trial. Equally apparent in the *Klopfer* decision (R. 15-17) is the fact that Klopfer now has no means under North Carolina law to compel the State to give him his day in court.

The question of whether delay in completing a particular criminal prosecution amounts to a denial of the right to a speedy trial depends upon all the circumstances and their relation to orderly expedition of criminal trials. *United States* v. *Ewell,* 383 U. S. 116 (1966). In determining whether delay in completing a criminal prosecution violates the accused's right to a speedy trial by extending beyond the period of time reasonably required by the State for the orderly administration of justice, the following four factors are especially relevant: the length of delay, the reason for the delay, the prejudice to the defendant and waiver by the defendant. *United States* v. *Simmons,* 338 F. 2d 804 (2nd Cir. 1964).

When these four factors are applied to the facts in the *Klopfer* case, it becomes immediately clear that none of them sustain to any extent the Solicitor's refusal to give Klopfer his day in court. As of August, 1965, when Klopfer's motion requesting trial or dismissal of his case was denied and the *nolle prosequi* with leave entered, almost eighteen months had elapsed since his indictment. (R. 7-9.) Likewise, over six months had passed since this Court's decision in *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964)—a factor made relevant by Klopfer's contention in his motion for speedy trial (R. 9-12), that the holding in *Hamm* barred any prosecution of Klopfer on the trespass charge. In this context, the suspension of Klopfer's case by the *nolle prosequi* with leave pointed forcefully to the conclusion that, although technically suspended, the delay of Klopfer's trial would, in fact, be permanent.

As to a reason for the indefinite suspension of Klopfer's trial, the Solicitor representing the State did not state at

any point in the proceedings any reason or justification whatsoever for entry of the *nolle prosequi* with leave. (R. 1-14.) At no point in the record of the proceedings (R. 1-14) or in the *Klopfer* opinion (R. 15-17) is there the slightest suggestion that the defendant has waived in any manner his right to a speedy trial. On the contrary, the record discloses clearly that Klopfer affirmatively sought the benefit of his right to a speedy trial in the trial court. (R. 9-12.)

In the *Klopfer* case, it is the factor of prejudice to the accused which is most glaringly transgressed by North Carolina's *nolle prosequi* with leave procedure. Along with preventing "undue and oppressive incarceration prior to trial"—a circumstance not in the *Klopfer* case, this Court in the case of *United States* v. *Ewell*, decided at the last Term, pointed out that the right to speedy trial protects an accused in the basic and vital interests of minimizing "anxiety and concern accompanying public accusation" and limiting "the possibilities that long delay will impair the ability of an accused to defend himself". *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). It is apparent that the right to a speedy trial also safeguards other cherished interests of the individual such as protecting against the possibility of oppression by intimidation and harassment and minimizing the expense and inconvenience involved in defending a criminal prosecution.

The State's denial of a speedy trial to Klopfer has burdened Klopfer with the very evils against which the right to a speedy trial is a shield. The offense of trespass with which Klopfer was charged exposed him to considerable contact with North Carolina criminal procedure consisting of arrest, posting of two different bonds, required attendance at a number of court sessions, a complete trial which ended in a mistrial, and a court-ordered appearance in court the week after the mistrial. (R. 1-9.) As is true in many ordinary misdemeanor charges, this substantial and unexpected involvement with the law obviously exposed the accused to considerable investment of his time and funds in defending against the prosecution. To this economic burden is added the often considerable inconvenience of repeated appearances in court.

Considering the factor of our increasingly transient population and the inevitable corrosive effect which time has upon memory, the denial of a speedy trial to Klopfer exposes him to the real possibility of substantial erosion of the evidence by which to defend himself. True, the State bears the same risk. But the adverse effect of delay on the availability and reliability of evidence is seldom, if ever, weighed out in precisely even portions. Therefore, in every criminal prosecution delay may prejudice the outcome in favor of the State.

The denial of a speedy trial to Klopfer, a professor of zoology at Duke University, is a gross invasion of his fundamental right to be secure in his reputation, standing and participation in the community. This unresolved prosecution exposes Klopfer, without recourse on his part, to the suspicions and adverse repercussions naturally attendant in any community toward anyone charged with a criminal offense. Likewise, Klopfer has been and is exposed now to the personal anxiety and apprehension which naturally arises in anyone confronted with a criminal prosecution, irrespective of the prospects for vindication.

With regard to the evil of oppression by intimidation and harassment, the denial of a speedy trial to Klopfer creates leverage by which the State may attempt to stifle, penalize and discourage the exercise of First Amendment rights such as free speech and free assembly where the accused has challenged the prevailing opinion of the community, as did Klopfer. (R. 10-11.) Since it is highly probable that the principle in *Hamm* v. *City of Rock Hill,* 379 U. S. 306 (1964) operates to bar prosecution of Klopfer on the trespass charge (R. 10-11), denial of a trial to Klopfer levies its most serious penalty in depriving Klopfer of the opportunity to obtain almost certain exoneration in public trial proceedings. The studied indifference shown by the North Carolina courts toward Klopfer's claim of the constitutional right to a speedy trial is evidence of the persistent and prejudicial indulgences in favor of the State and at the expense of the accused which pervade the administration of criminal justice in state courts, particularly in the South. In the *Klopfer*

case, the Solicitor's supposed pragmatic concern with the economics and possible outcome of a retrial for Klopfer was readily given priority over Klopfer's right to have the opportunity of exoneration. (R. 16-17.)

By trespassing upon these vital interests of the petitioner, Klopfer, the State of North Carolina has subjected Klopfer to a subtle and indirect, but nevertheless burdensome, form of punishment for an offense as to which the State is barred in all probability from obtaining a conviction. It would seem to admit of little argument that if the right to a speedy trial protects an accused from unreasonable delay, it necessarily protects an accused from total denial of the opportunity to have his day in court. Clearly those vital interests of the accused safeguarded by the right to a speedy trial are threatened and trampled proportionately more by absolute denial of trial than they are by unreasonable delay of a trial eventually held.

Although North Carolina's *nolle prosequi* with leave procedure may be of value in expediting criminal prosecutions, the objection by a defendent to its entry in his case obviously invokes the protection of the constitutional right to a speedy trial. It is contended here that the intentional act of the Solicitor in entering a *nolle prosequi* with leave over Klopfer's objection, taken in conjunction with the previous lapse at that time of eighteen months since indictment, constitutes unreasonable delay violative of Klopfer's right to a speedy trial and justifying this Court in holding further prosecution to be barred and that the indictment be dismissed. At the very least, the State's blatant disregard of Klopfer's right to a speedy trial entitles Klopfer to the relief of requiring the State of North Carolina to either give him a prompt trial or dismiss the indictment.

CONCLUSION

To make effective the guarantee of an accused's right to a speedy trial under the Sixth and Fourteenth Amendments in state criminal prosecutions, it is submitted the judgment below of the North Carolina Supreme Court should be reversed.

Wade H. Penny, Jr.
P. O. Box 522
Durham, North Carolina 27702
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 100

PETER KLOPFER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

WILLIAM W. VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

Attorneys for Amici

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Civil Liberties Union and the American Civil Liberties Union of North Carolina respectfully move for leave to file a brief as *amici curiae* in this case.

Petitioner has consented in writing to the filing of this brief. The State of North Carolina, respondent, following what the applicant understands to be the routine practice of the Attorney General's office, has refrained from either consenting or objecting to the filing of such brief.

The interest of the American Civil Liberties Union is twofold: the general interest it holds as a civil liberties organization, and, more specifically, a belief that justice requires that the decision in this case be reversed.

Since its founding in 1920, the American Civil Liberties Union has sought to prevent and to redress violations of civil liberties protected by the Constitution through litiga-

tion, educational programs, public statements and petitions to the Government. Its intention has never been to further the interest of any special group, but rather to defend the civil liberties of all persons equally. The American Civil Liberties Union hopes that an argument presented by an organization both experienced and specially concerned with maintaining constitutionally guaranteed liberties may be of aid to the Court in its adjudication of the sensitive issues raised by this case.

Amici move for leave to file this brief for two specific reasons:

a. The harm resulting to petitioner and to other criminal defendants whose prosecutions may be indefinitely continued by the granting of *nol. pros.* with leave, and similar devices, warrants the fullest possible exposition of the serious and novel constitutional issues raised by these practices.

b. The unqualified availability of *nol. pros.* with leave, by its presence, its broad application by the solicitor, and its excessively permissive use by the State Supreme Court, is a substantial threat to the free expression of unpopular beliefs and ideas. This issue demands extensive analysis.

We fear that the parties may not fully address themselves to the above issues. We believe our brief will aid the Court by emphasizing these aspects of the litigation. If our arguments were accepted, they would be dispositive of this case.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movant

IN THE

Supreme Court of the United States

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STATE OF NORTH CAROLINA,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NORTH CAROLINA CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of the *Amici*

We respectfully refer the Court to the preceding motion for leave to file this brief wherein the interest of *amici curiae* is set forth.

Questions Presented

1. May a State through its criminal procedure empower the solicitor to suspend a criminal proceeding without explanation or cause and to reinstitute the prosecution at any time, without providing any standards for the solicitor to follow, and thus deny to the accused a speedy trial of the charges pending against him in violation of the Sixth

Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution?

2. May a State employ a procedure in a criminal trial the effect of which is necessarily to punish and to stigmatize a person indirectly for that which the State could not otherwise punish him, thus denying Petitioner due process of law?

3. May a State through its criminal procedure give its solicitor the absolute discretion to suspend or try a criminal offense once the indictment has issued, when the necessary effect of such power may discourage or stifle the free expression of unpopular ideas and beliefs protected by the First Amendment?

Statement of the Case

On February 24, 1964, petitioner, Professor Peter Klopfer, was indicted for criminal trespass, punishable by imprisonment for as long as two years. The trespass was alleged to have taken place when he and others, seeking nondiscriminatory service in a place of public accommodation, sought access to the cafe premises of Austin Watts, Chapel Hill, North Carolina. Petitioner pleaded "not guilty" at his trial in March, 1964. After due deliberation upon all the evidence, the jury was unable to reach a verdict. Thereupon the Court withdrew a juror and entered an order of mistrial. Petitioner's case was not retried during any subsequent Criminal Session that year.

Shortly thereafter, but one year after the original mistrial, the solicitor advised petitioner's attorney of his intention to move the Court for a *nol. pros.* with leave. There-

upon, petitioner, through his attorney, opposed in open court at the April, 1965, Criminal Session the entry of such motion in petitioner's case. The solicitor then stated that he wished to retain petitioner's case in its trial docket status.

Petitioner's case was not listed for trial during the August, 1965, Criminal Session. The Court, in response to petitioner's motion seeking ascertainment of the status of his case, inquired into the matter in open court. At that time the solicitor moved the Court for a *nol. pros.* with leave, but without explanation as to why it was appropriate to continue its case. The motion was granted. Petitioner objected and took exception to the entry.

On appeal to the North Carolina Supreme Court the entry of *nol. pros.* with leave was affirmed, *State* v. *Klopfer,* 145 S. E. 2d 909 (1966).

ARGUMENT

I.

The *nol. pros.* with leave, giving the solicitor the naked power to suspend a criminal prosecution or to reinstitute said prosecution at any time thereafter, denies petitioner his right to a speedy trial of the charges pending against him in violation of the Sixth Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution.

a. The *Nol. Pros.* With Leave: Its Nature and Its Use.

North Carolina G. S. 15-175 is the State's *nol. pros.* statute. However, it is not clear either from the record or from the opinion of the North Carolina Supreme Court whether the State, in petitioner's case, invoked this statute or some common law legacy. In either case, the effect is the same. As judicially interpreted, this procedure gives local solicitors, on behalf of the State, practically unlimited power to determine the disposition and course of pending criminal prosecutions. Once an indictment has issued, the solicitor has the authority to move for entry of *nol. pros.* with leave, without any showing of cause. Upon the granting of the motion by the Court, the solicitor then is empowered either to forestall trial of the cause for however long he wishes or to reinstitute prosecution at any time thereafter. No standards are imposed upon his discretion either by statute or by case law. *State* v. *Thompson*, 10 N. C. 613 (1825); *State* v. *Buchanen*, 23 N. C. 59½ (1840); *State* v. *Thornton*, 35 N. C. 258 (1852); *State* v. *Moody*, 69 N. C. 529 (1893); *State* v. *Furmage*, 250 N. C. 623, 109 S. E. 2d 563 (1959). The solicitor is equally free, once *nol. pros.* with

leave has been entered, to reinstitute the prosecution. He does not have to show cause; he need only apply to the clerk of the court to have a capias issued as a matter of right. *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912); *State* v. *Klopfer,* 145 S. E. 2d 909, 910 (1966).

In this critical regard, a *nol. pros.* with leave is significantly different from a *nol. pros.* [without leave] which requires that the trial court first consent before a long delayed prosecution can be reinstated and the defendant made to stand trial. While even the *nol. pros.* [without leave] may in practice prejudice the accused because reinstatement of trial is "usually and properly left to the discretion of the Solicitor," still the exercise of that discretion is within the control of the court as a matter of law. *State* v. *Moody,* 69 N. C. 529 (1893); *State* v. *Buchanen,* 23 N. C. 59 (1840); *State* v. *Thompson,* 10 N. C. 613 (1825). Before an accused can be arrested and brought to trial on a stale indictment in such cases, a capias must first be secured from a court required to determine whether issuance of the capias would constitute an abuse of process under the circumstances. Thus, the State Supreme Court has said the following of the *nol. pros.* [without leave]:

> A *nol. pros.* in a criminal proceeding is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same

> indictment and he be tried upon it . . . . The abuse to which such power, on the part of the prosecuting officer, is liable, is checked and restrained by the fact that a *capias* after a *nol. pros.* does not issue as a matter of course, upon the mere will and pleasure of the officer, but upon the permission of the court first had; and the court will always see that its process is not abused to the oppression of the citizen. *State* v. *Thornton,* 35 N. C. 258 (1852).

Even this slight safeguard is totally absent with respect to a *nol. pros.* with leave, as the State Supreme Court clearly stated in *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912):

> The only difference between a general or unqualified *nol. pros.* and one "with leave" is that in the latter case the leave to issue a capias upon the same bill is given by the court in advance, instead of upon a special application made afterwards. . . . .[I]n both the prisoner is discharged without day . . . In both he can be taken upon a fresh capias, in one by special order, and in the other under the general leave to issue.

The susceptibility of the defendant to re-arrest on a stale indictment without judicial intervention under a *nol. pros.* with leave was expressly acknowledged in petitioner's own case when the State Supreme Court said:

> When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered the case may be restored to the trial docket when ordered by the judge upon

> the solicitor's application. When a *nolle prósequi with leave* is entered, the consent of the court is implied in the order and the solicitor [without application to the court] may have the case restored for trial. *State* v. *Klopfer,* 266 N. C. 349, 145 S. E. 2d 909, 910 (1966).

It thus is clear that the *nol. pros.* with leave procedure permits the solicitor to control the aftermath of a pending criminal indictment without ever seeking leave of court and without being accountable to a judicial officer.

If the solicitor reinstitutes prosecution of a trial that has been halted under the *nol. pros.* with leave procedure, he may do so at any time, however remote from the date of the indictment, without running afoul the two year statute of limitations generally applicable to misdemeanors. N. C. Gen. Stat. 15-1. When an indictment first issues, the statute of limitations stops running. It does not begin running again when the *nol. pros.* with leave is entered, but remains suspended indefinitely. *State* v. *Williams,* 151 N. C. 660, 65 S. E. 908 (1909).

Not only does the *nol. pros.* with leave procedure enable the solicitor to delay or to bar prosecution indefinitely, but the criminal defendant, under indictment for a misdemeanor, is without means to bring his cause to trial to secure his opportunity for exoneration. Unlike the solicitor, he cannot set his case for trial. Nor can he find antidotal relief in either the Constitution or General Statutes of North Carolina. Once the solicitor has suspended the trial by taking a *nol. pros.* with leave, the defendant is without hope of a speedy trial unless the solicitor promptly changes his mind and decides to reinstate the prosecution. The

fortune of the defendant thus rests entirely with the will of the solicitor.

A number of jurisdictions have acknowledged the threats to the fair administration of justice inherent in such procedure as that followed in this case. Forty-three states afford the criminal defendant constitutional guarantee of a speedy trial in all criminal prosecutions. See Appendix 1, 2, post. In addition, nine states guarantee this right by statute. See Appendix 4, post. Beyond these general and only partly efficacious provisions, approximately one-fourth of the states also have seen fit altogether to abolish *nol. pros.* expressly by statute, or have greatly reduced its entry by the prosecution. See Appendix 5, post. Several states have placed the sole power for its entry in the court. See Appendix 6, post. And several other states do not mention any *nol. pros.* procedure whatever in their statutory schemes. See Appendix 8, post. Among the fifty states, only North Carolina currently permits its local solicitors freely to use the *nol. pros.* with leave. No other state includes the *nol. pros.* with leave in its criminal procedure.

At the same time, North Carolina has no operative guarantee of a speedy trial in its constitution to offset the broad power given solicitors by the *nol. pros.* with leave procedure. To be sure, the state constitution contains general language that justice shall be administered "without sale, denial, or delay" (N. C. Const. art. 1, §35), but this language has never been interpreted by its courts to require a prosecutor to indicate why *nol. pros.* with leave would not deny or delay justice in a particular case. See Appendix 3, post. It has never been used to limit the use of *nol. pros.* with leave. The only meaningful protection against delay that North Caro-

lina affords its criminally accused is found in N. C. Gen. Stat. 15-10, applicable only to incarcerated felons. See Appendix 4, post. The State offers no relief from delay, however unreasonable, to one who has been indicted for a misdemeanor.

Neither does the state offer any justification for delay, as this case illustrates. The *nol. pros.* with leave in this case was granted over petitioner's strenuous objection, without explanation by the court or the solicitor. Indeed, the State Supreme Court was unable to ascertain any reason from the record. It speculated only that the solicitor "may have concluded that another go at it *would not be worth the time and expense of another effort.*" *State* v. *Klopfer*, 145 S. E. 2d 909, 910 (1966). (Emphasis added.) It is impossible to understand how this view of the case justifies anything other than a dismissal of the prosecution, rather than a wholly arbitrary subordination of petitioner's right to a speedy trial.

Such a condition of state law exerts very forceful pressure upon every criminal defendant in a misdemeanor prosecution who would otherwise plead "not guilty" and immediately join issue, knowing full well that whatever the outcome he could eventually resume his normal life, free from anxiety and future jeopardy. But the defendant who must frame his plea under the threat that the prosecutor may indefinitely delay the trial of his cause through the discretionary *nol. pros.* with leave, lacks this measure of opportunity and security. Knowing that he has no assurance of a prompt trial and that he will be subject to prosecution at any time in the future, he is under extreme pressure to forgo his cause and to plead guilty. If the state's procedure cannot guarantee the security of a speedy trial, even

upon minimum standards of promptness, and in its stead vests such power in the solicitor as does the *nol. pros.* with leave procedure, then the criminal defendant is simply deprived of his right to defend himself without jeopardizing his job, his family, his standing and reputation in the community.

This is the plight of petitioner who has been two years under indictment. He remains "neither innocent nor guilty," but without doubt, to all the community, accused and indicted. The solicitor has denied Professor Klopfer a speedy trial upon the charges—an opportunity to establish his innocence, to recover his dignity and to be free of the specter of future prosecution. The solicitor has greatly interfered with petitioner's ability to schedule lecture and speaking tours outside North Carolina in his capacity as Professor of Zoology at Duke University. He has, in effect, snared Professor Klopfer in a web of uncertainty. Of only one thing can petitioner now be sure: he will remain in jeopardy for the rest of his life, subject indefinitely to the power of the solicitor or his successors to reinstate prosecution.

b. The Right to a Speedy Trial: History and Policy Considerations.

The right to a speedy trial is of long standing. Its basic nature is disclosed by its deep roots in the early common law. It was first given effect in the Magna Carta where it was written "To no one will we sell, to no one deny or delay, right or justice." This provision was subsequently implemented by special writs of jail delivery and later by commissions of jail delivery under which special judges emptied the jails twice each year and either convicted and

punished the prisoners or set them free. II COKE INST. 43. In 1679 Parliament passed the Habeas Corpus Act, 31 Car. II, Ch. 2, which required that prisoners indicted for treason or felony be tried at the next sessions or be released on bail. That Act, which Blackstone called "the Bulwark of the British Constitution", 4 COMMENTARIES 438, was still cherished by the British people at the time our Constitution was adopted, Hale's HISTORY OF THE COMMON LAW, p. 87 et seq. (5th ed.) and by American patriots and lawyers nurtured on Blackstone. Some believed that the right to a speedy trial and other similar rights were so clearly a part of our "liberty" that no Bill of Rights was necessary. THE FEDERALIST, No. 84. But to be sure that these and other fundamental rights would be preserved to the People, the first nine Amendments were added to the Constitution; and the right to a speedy trial was given first place among the rights in the Sixth Amendment. In time, most of the states adopted the language or policy of the Sixth Amendment into their own constitutional or statutory schemes. See Appendix 1, 2, 4, 10, post.

An examination of these early acts and of the state court decisions which interpreted them helps to elucidate what those who ratified the Sixth Amendment meant by the term "speedy trial." Generally, the early acts provided that the trial of a criminal indictment had to be held within a specified period of time or that the indictment had to be dismissed. See Appendix 11, post. In addition, many courts felt that the indictment should be dismissed whenever the delay was substantial or unreasonable or prejudicial to the accused regardless of the cause of that delay. See Appendix 12, post. Other courts, agreeing with the basic premise set out above, denied dismissal of the indictment only if the

accused had caused the delay himself. See Appendix 12, post. Cooley aptly expressed the underlying policies and apprehension felt by the ratifiers of the Sixth Amendment when he wrote:

> Again, it is required that the trial be *speedy;* and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared that they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused. When a person charged with a crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable except that which is necessary for proper preparation and to secure the attendance of witnesses. . . . CONSTITUTIONAL LIMITATIONS (8th ed.), Vol. 1, p. 645 et seq.

Most of the federal cases have gone off on the ground that the accused waives his right to a speedy trial unless he specifically demands it in a timely fashion. See Appendix 13, post. However, a great majority of federal cases have recognized that if a defendant does not waive his right to a speedy trial by failing to ask for it, he may, in a proper case, be entitled to a discharge because of unreasonable delay in bringing his case to trial. See Appendix 14, post.

The policies underlying the right to a speedy trial are now, as they were in Blackstone's England, the embodiment of realistic concern for the rights of the accused in a free

society. This policy has two equally significant aspects: the desire to protect the individual from the indignity, harassment and anxiety of an unresolved arrest and indictment, *Ex parte Pickerill*, 44 F. Supp. 741, 742 (N. D. Tex. 1942); and the grave concern that the individual, because of delay, will be denied the fair administration of justice. This latter aspect of the policy acknowledges that the value of a speedy trial is that it best preserves to the defendant the means of proving his case. *United States* v. *Ewell*, 383 U. S. 116 (1966); *Fouts* v. *United States*, 253 F. 2d 215, 217 (6th Cir. 1958); *United States* v. *Chase*, 135 F. Supp. 230, 232 (E. D. Ill. 1955). The United States Supreme Court recently articulated this concern for the criminal defendant when it stated:

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, *to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself.* *United States* v. *Ewell, supra*, at page 120. (Emphasis supplied.)

While the Court speaks of the need to prevent undue or oppressive incarceration prior to trial as one reason why there is a need for such constitutional protection, the Sixth Amendment is not so limited in its concern for the individual. When a criminal defendant pleads that he has been denied a speedy trial, it is not necessary for him to stipulate that he is incarcerated or even that he has been or will be demonstrably prejudiced by the delay. *United States* v. *Lustman*, 258 F. 2d 475, 477 (2d Cir. 1958); cert. denied 358 U. S. 880 (1958); *Ex parte Pickerill, supra*, at page 472.

To be sure, prior incarceration represents only one aspect of Sixth Amendment "speedy trial" protection. It seems obviously consistent with the Sixth Amendment's policy of protecting the criminally accused that the allegation of a large quantum of genuine personal anxiety and the possibility of the erosion of the opportunity for exoneration should offset the fact that the accused is not incarcerated. *United States* v. *Fay*, 313 F. 2d 620, 623 (2d Cir. 1963). One is not less subject to the disabilities attending a long delay merely because he is not held in custody. Of equal importance is the fact that he is subject to anxiety and concern over the possible disposition of the indictment pending against him, and that he must continue to entertain grave doubts about his future security. To require that the accused be incarcerated to raise the issue of delay would place an intolerable burden upon the exercise of the constitutional right to a speedy trial by making it unavailable to all defendants whose indictments were *nol. prossed* against their will or who had committed a bailable offense and who had chosen bail rather than jail. Such restrictive application of the Sixth Amendment is not consistent with the all-embracing protection afforded by this Constitutional provision. The right of a speedy trial is far more inclusive than the doctrine of prior incarceration would admit:

> A prisoner, a convict, one on bond, *or any and every person who is charged with an offense,* has a legal right to a speedy settlement of the charge that is asserted against him. *Ex parte Pickerill, supra,* at page 742. (Emphasis supplied.)

To require an accused to remain in jail, especially in a situation where he would not be permitted to do so because his case had been *nol. prossed,* would subvert the Constitutional right to a speedy trial and undermine the several policies of the Sixth Amendment.

The importance of the speedy trial of criminal offenses in a democratic society derives not only from its need to protect the accused, but equally to protect the public order. The societal interest in security demands speedy trial, for this facilitates both effective prosecution of criminals and greater deterrence to potential criminals.

c. The Right to a Speedy Trial: Its Application to the States Through the Fourteenth Amendment.

Federal courts have sometimes suggested that the Sixth Amendment guarantee to a speedy trial is not directly or fully applicable to the states through the Due Process Clause of the Fourteenth Amendment. *In re Sawyer's Petition,* 229 F. 2d 805, 812 (7th Cir. 1956). This does not mean, however, that the state defendant is entirely without the equivalent of specific Sixth Amendment protection. Language bearing upon this issue points up that the Fourteenth Amendment protects the state defendant against the denial of a speedy trial to the extent that such denial is inconsistent with fundamental due process. *Mattoon* v. *Rhay,* 313 F. 2d 683, 684-685 (9th Cir. 1963); *Odell* v. *Burke,* 281 F. 2d 782, 787 (7th Cir. 1960); *Hastings* v. *McLeod,* 261 F. 2d 627 (9th Cir. 1958) (per curiam); *New York* v. *Fay,* 215 F. Supp. 653, 655 (S. D. N. Y. 1963); *Gordon* v. *Overlade,* 135 F. Supp. 577, 578 (N. D. Ind. 1958). In recent years, the Supreme Court, demonstrating forthright concern for the rights of the accused, has broad-

ened that understanding of due process. To that end the Court has brought within the scope of Fourteenth Amendment protection those safeguards in the first nine Amendments fundamental to " . . . the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937). Speaking for the Court in *Gideon* v. *Wainwright,* 372 U. S. 335, 341 (1963), Mr. Justice Black has pointed out that there are " . . . ample precedents for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." The Court has more recently sharpened this point, emphasizing that " . . . since [*Gideon*] it no longer can broadly be said that the Sixth Amendment does not apply to state courts." *Pointer* v. *Texas,* 380 U. S. 400, 406 (1965). To remove any doubts about where the Court stands on this issue, it has observed: " . . . [i]n the light of *Gideon, Malloy* [*Malloy* v. *Hogan,* 378 U. S. 1 (1964)], and other cases cited in these opinions . . . the statements made . . . that the Sixth Amendment does not apply to the states *can no longer be regarded as the law* [emphasis added]. *Pointer* v. *Texas,* 380 U. S. 400, 406 (1965).

It has been nearly three decades since this Court reminded us that "the Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Johnson* v. *Zerbst,* 304 U. S. 458 (1938). In *Pointer,* the Court was at pains to acknowledge that justice must also be done by the states (at p. 403):

> The Sixth Amendment is a part of what is called our Bill of Rights. In *Gideon* v. *Wainwright,* supra, in

> which this Court held that the Sixth Amendment's right to the assistance of counsel is obligatory upon the States, we did so on the ground that 'a provision of the Bill of Rights which is fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment.

Surely there is no basis for holding that a speedy trial is less fundamental and less essential to a fair trial. Surely it would be an unprincipled anomaly to hold that the due process clause of the Fourteenth Amendment holds the states to every other Sixth Amendment standard of fundamental fairness, but not to this one. And without question, the protection of the Sixth Amendment is subverted when a state may indefinitely delay a trial without reason, until the efficacy of the accused's defense has been debilitated by the ravages of time and he has been obliquely punished by the stigma of his arrest and indictment. Such deliberate procrastination undercuts the possibility of having a fair trial, having repose from the threat of prosecution, and having an opportunity for exoneration.

The *nol. pros.* with leave procedure, which in practice and in this case grants the solicitor the unfettered power to delay a trial indefinitely, and which, in fact, has permitted the delay of petitioner's trial for two years, will not wash in the wake of standards of fundamental fairness. Due process demands that every accused have a fair trial, which necessitates, as a minimum, as prompt a trial as the fair administration of justice will allow. *Shepard* v. *United States,* 163 F. 2d 974, 976 (8th Cir. 1947). Time does not recognize jurisdictional boundaries. Wherever the situs, the ingredients of a fair trial blend in the same way. Unreasonable delay is inimical to the rights of the

accused wherever the forum. *United States* v. *McWilliams*, 69 F. Supp. 812, 814 (D. D. C. 1946); *United States* v. *Fay*, 313 F. 2d 620, 623 (2d Cir. 1963); *State of Maryland* v. *Kurek*, 233 F. Supp. 431, 432 (D. Md. 1964).

This Court has properly declared that the degree of delay permissible for completion of a prosecution under the Sixth Amendment depends upon a number of circumstances to reconcile the right to a speedy trial with the fair administration of justice. *Pollard* v. *United States*, 352 U. S. 354, 361 (1957). Whether a particular delay has been unreasonable depends essentially upon the interplay of four factors: the length of the delay; the reason for the delay; the prejudice to the accused; and waiver by the accused. *United States* v. *Simmons*, 338 F. 2d 804, 807 (2d Cir. 1964).

In the instant case, approximately two years have elapsed since the indictment issued against petitioner. So far as the *nol. pros.* with leave procedure is concerned, it may continue indefinitely—entirely at the discretion of the solicitor. *Wilkinson* v. *Wilkinson*, 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912).

The State failed to suggest any reason for further delay of the trial at the time it secured the *nol. pros.* with leave. In view of the fact that one trial on the indictment had already been completed, that the alleged incident occurred locally, that the witnesses were few in number, close at hand, and readily available (they had already testified in Professor Klopfer's first trial and repeatedly, in four companion cases), it is not surprising that the solicitor could express no reason to continue this proceeding. The North Carolina Supreme Court could only speculate that the solicitor "may have concluded that another go at it would not

be worth the time and expense of another effort." *State* v. *Klopfer*, 145 S. E. 2d 909, 910 (1966). But far from providing any reason whatsoever for indefinitely continuing the prosecution, this speculation suggests only that the prosecution should have been dismissed. Thus, the prosecutor failed to state a reason to justify further delay and the State Supreme Court was frankly unable even to hypothesize an appropriate justification.

We respectfully submit, however, that an examination of the facts and setting of this prosecution tend convincingly to establish that the actual reason for the prosecutor's action may have been highly improper and vindictive, and that it had nothing whatever to do with the fair administration of justice. Petitioner was indicted for criminal trespass, having peacefully sought service in a place of public accommodation. His trial concluded indecisively shortly before Congress adopted the Civil Rights Act of 1964, including of course the sections applicable to places of public accommodation. 78 Stat. 241, Tit. II, §201 (b) (2). Those sections were upheld by this Court in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) and *Katzenbach* v. *McClung*, 379 U. S. 294 (1964). On December 14, 1964, this Court interpreted the Civil Rights Act as protecting peaceful efforts to secure service in places of public accommodations, and as forbidding attempts to punish such efforts through prosecution and harassment under state anti-trespass laws. *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964). On March 5, 1965, the United States Court of Appeals for the Fifth Judicial Circuit held that state trespass prosecutions forbidden by the Civil Rights Act as interpreted in *Hamm* were removable to appropriate federal district courts, and it held further that the district

court should order any such prosecutions to be dismissed once they had been appropriately removed. *Rachel* v. *Georgia*, 342 F. 2d 336 (5th Cir. 1965), *aff'd*, 86 S. Ct. 1783 (1966). A little more than a month after the circuit court decision in *Rachel* and about four months after this Court's decision in *Hamm*, the solicitor in this case served notice on petitioner that he intended not to reinstate the prosecution but to secure a *nol. pros.* with leave! Thus, the solicitor "rescued" himself from having his case dismissed upon removal to a federal district court, circumventing the Civil Rights Act and the removal statute (28 U. S. C. §1443(1)), and temporarily succeeding in an enterprise which left the petitioner with "the presence of an unresolved criminal charge [which] may hang over [his] head . . . for years" or for the rest of his life. *City of Greenwood, Mississippi* v. *Peacock*, 86 S. Ct. 1800, 1821 (1966) (dissenting opinion). We say "*temporarily* succeeding," rather than "permanently succeeding," solely in reliance upon the Constitution and the wisdom of this Court.

There is no way fully to measure the prejudice sustained by Professor Klopfer, whether in terms of anxiety respecting the specter of future prosecution, community stigma from an arrest and indictment he has had no reasonable opportunity to overcome, prejudice to his career, lost ability to defend himself, or disillusionment with the fair administration of justice. There is no exact way of measuring the future effect on his ability successfully to exercise rights under the Constitution and the laws of the United States, knowing that he may be harassed by arrests followed by *nol. pros.* with leave. There is no way accurately to measure the prejudice to others in North Carolina who know of Professor Klopfer's experience, and

who must surely take it into account in judging how safely they may rely upon rights established by the Constitution, Acts of Congress, and the decisions of this Court. All that can be said with certainty is that the prejudice will increase with the passing of time, exactly as the solicitor's lack of any proper justification for delay becomes ever clearer.

Finally, we note that petitioner did not waive his right to a speedy trial. To the contrary, the record demonstrates that his counsel made timely objection and took express exception to the entry of *nol. pros.* with leave (R. 11-12).

Viewed alone, any one of these factors might not amount to unreasonable delay. But as an aggregate, they easily reach due process dimensions.

II.

The *nol. pros.* with leave violates due process in operating to punish the petitioner in the absence of a fundamentally fair trial.

Due process requires not merely that criminal trials must be conducted free of fundamental error, but that the accused must be given a reasonable opportunity to end the stigma and disabilities of arrest and indictment by establishing his innocence. Due process assures the accused the affirmative right to have a fair trial take place. It is obvious that the significant right to establish one's innocence may be eroded in direct proportion to the lapse of time between his arrest and his trial. Just as the ravages of time adversely affect the availability of the State's evidence and the State's witnesses against him, so they equally affect his ability to secure exoneration against the criminal charge as well as against the prospect of convic-

tion. After sufficient time has gone by to enable the accused and the State to prepare for trial, further delay operates to their mutual disadvantage by atrophy of their evidence. The result is to increase the likelihood that no meaningful trial can be held and, correspondingly, that the accused will have to live out his life subjected to the disabilities of an unresolved record of criminal arrest and indictment. Without the aid of this Court, petitioner is virtually certain to endure such oblique punishment. He has no means pursuant to any procedure in North Carolina either to bring his case to trial or to secure a dismissal of the indictment. No remedy exists to offset the solicitor's discretion to delay the trial indefinitely. Beyond that, the solicitor has failed to suggest any reason why further delay beyond two years is necessary or even consistent with any desire by him to prosecute the case. And beyond this, it is clear that but for the prosecution's power to hold the accused in limbo for the rest of his life, the accused would in fact already have been vindicated at law.

As previously noted, petitioner was indicted for criminal trespass for having peacefully sought service in a place of public accommodation plainly within the meaning of the Civil Rights Act of 1964. 78 Stat. 241, Tit. II, §201(b)(2). Pursuant to this Court's decision in *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964), he could not now be convicted of the offense for which he stands accused and indicted. The *Hamm* decision, moreover, occurred before the solicitor obtained a *nol. pros.* with leave in this case. It was therefore clear at the time not only that no additional time was required to prepare adequately the prosecution of this case which had already been tried once (before the *Hamm* decision), but that no subsequent prosecution could succeed.

The effect of the *nol. pros.* with leave is therefore not only to deprive the accused of his opportunity to establish his innocence and to resolve the record of his arrest and indictment, but to deprive him of the certainty of vindication. The net effect of the proceedings below is to punish the petitioner subliminally through the expedient of an unresolved record of arrest and indictment which he must carry with him for the rest of his life, unless this Court acts.

III.

The *nol. pros.* with leave, granted without reason in this case, represents a continuing *in terrorem* deterrent to the exercise of constitutionally protected rights of speech, assembly, association, and equal protection in North Carolina.

It is no secret that expressions in opposition to racial discrimination are unpopular with much of the white citizenry of the South. North Carolina makes it very easy for its local solicitor to discourage such expression. It has armed him with the discretionary *nol. pros.* with leave, thus empowering the solicitor to suspend indefinitely the trial of one who, such as Professor Klopfer, has been arrested and indicted while engaging in a locally unpopular, though constitutionally protected, form of conduct. The State also has empowered its solicitor, through this same procedure, to cause the protestant to be again arrested upon the same indictment as often as the solicitor wills, each time putting the accused to the burden of arranging bond and preparing his defense. It is not difficult to foresee that if petitioner again engages in a racial protest or, for that matter, in any form of expression or conduct disapproved of by the State or the solicitor, he might well be

re-arrested upon the indictment now pending, once, twice, or many times, and gravely inconvenienced and embarrassed.

In light of Professor Klopfer's position as a member of a university faculty, such harassment would present a grave threat, jeopardizing his career as well as his standing and reputation in the community. The effect, therefore, is to force petitioner to choose between his career and effectively expressing his dissatisfaction with racial segregation. Neither the State nor its solicitor has the right to force so unconscionable a choice on one who would otherwise engage in a form of unpopular expression, unless the State can demonstrate some overriding, compelling interest. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U. S. 516 (1960). North Carolina's solicitor has failed in petitioner's case to show any State interest to be preserved by permitting petitioner's indictment to continue. It is especially doubtful in light of the effect that *Hamm* and the Civil Rights Act of 1964 would have upon a conviction that any reason to continue the indictment exists other than the deterrent effect it is bound to have upon petitioner's future conduct.

To the extent that the *nol. pros.* with leave empowers the solicitor to deter petitioner from again engaging in a racial protest, this procedure does not pass constitutional muster. If petitioner is ever again to feel free to express an unpopular belief in North Carolina, the indictment pending against him must be dismissed.

CONCLUSION

To safeguard petitioner's right to a fair and speedy trial as well as his right to express unpopular beliefs, this Court should dismiss the indictment pending against petitioner pursuant to the discretionary *nol. pros.* with leave.

Respectfully submitted,

WILLIAM W. VAN ALSTYNE
Duke University
School of Law
Durham, North Carolina

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

Attorneys for Amici

September 1966

The attorneys for *amici* acknowledge the invaluable assistance of Mr. Steven Roth, a student at the Duke Law School.

APPENDIX

1. Thirty-eight constitutions provide, like the Sixth Amendment, that the accused shall enjoy the right to a speedy and public trial in all criminal prosecutions. Ala. Const. art. 1, §6; Alaska Const. art. 1, §11; Ariz. Const. art. 2, §24; Ark. Const. art. 2, §10; Cal. Const. art. 1, §13; Colo. Const. art. II, sec. 16; Conn. Const. art. 1, §9; Del. Const. art. 1, §7; Fla. Const. DR sec. 11; Ga. Const. art. 1, §2-105; Idaho Const. art. 1, §13; Ill. Const. art. 2, §9; Iowa Const. art. 1, §10; Kan. Const. B. of R., §10; Ky. Const. §11; La. Const. art. 1, §9; Me. Const. art. 1, §6; Md. Const. D. R. art. 21; Mich. Const. 1963 art. 1, §20; Minn. Const. art. 1, §6; Miss. Const. art. 3, §26; Mo. Const. art. 1, §18(a); Mont. Const. art. 3, §15; Neb. Const. art. 1, §11; N. J. Const. art. 1, par. 10; N. D. Const. art. 1, §13; Ohio Const. art. 1, §10; Okla. Const. art. 2, §20; Pa. Const. art. 1, §9; R. I. Const. art. 1, §10; S. C. Const. art. 1, §18; Tenn. Const. art. 1, §9; Tex. Const. art. 1, §10; Utah Const. art. 1, §12; Va. Const. art. 1, §8; Vt. Const. ch. I, art. 10; Wis. Const. art. 1, §7; Wyo. Const. art. 1, §10.

2. Six constitutions, not specifically guaranteeing the accused a speedy and public trial, state that justice shall be administered speedily and without delay. This, too, has been construed to afford the accused the right to a speedy trial.

   Ariz. Const. art. 2, §11 (But see appendix 1, supra); Ind. Const. art. 1, §12; Kan. Const. B. of R., §18 (But see Appendix 1, supra); Ore. Const. art. 1, §10; Wash. Const. art. 1, §10; W. Va. Const. art. III, §14.

3. Six states have no constitutional guarantee of a speedy trial.

   Hawaii, Massachusetts, Nevada, New Hampshire, New York, North Carolina.

   Three of these states have language in their constitutions similar to that of the Indiana constitution. (Appendix 2, Supra). Mass. Const. pt. 1, Art. XII, §12; N. H. Const. pt. 1, art. 14; N. C. Const. art. 1, §35. But thus far there have been no judicial decisions interpreting this to guarantee the right to a speedy trial.

4. Eleven states provide by statute that the accused shall enjoy the right to a speedy trial.

   Ariz. Rev. Stat. Ann. art. 3, §13-161; Ark. Stat. Ann. tit. 43, §1703; Ga. Code Ann. ch. 27-6, §21-601; Idaho Code tit. 19, §3501; Ill. Rev. Stat. 1965 tit. 28, §103-5; Kan. Stat. Ann. §62-1431 et seq.; Ann. Laws of Mass. tit. 277, §72; Mo. Stat. Ann. §545.890; Nev. Rev. Stat. §169.160; N. C. Gen. Stat. 15-10 (applying to felony offenses only); Okla. Stat. Ann. tit. 22, §13; Code of Law of S. C. tit. 17, §509 (felony); §510 (misdemeanor).

5. Approximately one-fourth of the States have abolished *nol. pros.* expressly by statute or have greatly restricted its entry.

   California, Cal. Pen. Code §1386: "The entry of a nolle prosequi is abolished, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section." (i.e., §1387: "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense if

it is a misdemeanor, but it is not a bar if the offense is a felony.").

Idaho, Idaho Code Ann. 19-3506: "The entry of a nolle prosequi is abolished, and neither the attorney-general nor the prosecuting attorney can discontinue or abandon a prosecution for a public offense except as provided in the last section."

Iowa, Iowa Code §795-5 (by implication): "The court upon its own motion or the application of the county attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated and the order entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a misdemeanor; but it is not a bar if the offense charged be a felony."

Minnesota, Minn. Stat. §631.21 (by implication): "The court may, either of its own motion or upon the application of the prosecuting officer, and in furtherance of justice, order any criminal action, whether prosecuted upon indictment, information or complaint, to be dismissed; but in that case the reasons for the dismissal shall be set forth in the order, and entered upon the minutes, and the recommendations of the prosecuting officer in reference thereto, with his reasons therefor, shall be stated in writing and filed as a public record with the official files of the case."

Montana, Mont. Rev. Code Ann. §94-9506: "The entry of the nolle prosequi is abolished, and neither the attorney-general nor the county attorney can discon-

tinue or abandon the prosecution of a public offense, except as provided in the last section." (i.e., §94-9507: "An order for the dismissal of an action, as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.").

Nevada, Nev. Rev. Stat. §178-515: "Neither the attorney-general nor the district attorney shall hereafter discontinue or abandon a prosecution for a public offense, except as provided in NRS 178.510." (Note: §178.510 provides for the dismissal of an action on the motion of the prosecuting attorney or the court; 178.520 provides that such a dismissal is a bar to further prosecution for the same offense if it is a misdemeanor.).

New York, N. Y. Crim. Code §672: "The entry of a nolle prosequi is abolished, and neither the attorney-general, nor the district attorney, can discontinue or abandon a prosecution for a crime, except as provided in the last section."

North Dakota, N. D. Rev. Code §29-1805: "The entry of a nolle prosequi is abandoned in this state, and the state's attorney cannot discontinue or abandon a prosecution for a public offense, except as provided in section 29-18-04." (§29-18-04 provides that the court or the state's attorney upon application to the court, may, upon its own motion or upon granting the state's attorney's application, dismiss a prosecution. The reasons for the dismissal must be set forth in the minutes. However, §29-18-06 provides that such a dismissal is not a bar to further prosecution for the same offense.).

Oklahoma, Okla. Stat. tit. 22, §816: "The entry of a

nolle prosequi is abolished, and the county attorney cannot discontinue or abandon a prosecution for a public offense, except as provided in the last section." (i.e., §§815 and 817. The language of these two sections is identical with the language of N. D. Rev. Code §§29-18-04 and 29-18-06, supra.).

Oregon, Ore. Rev. Stat. §134.160: "The entry of a nolle prosequi is abolished, and the district attorney cannot discontinue or abandon a prosecution for a crime, except as provided in ORS 134.150." (Note: ORS 134.150 provides for a dismissal by the court; ORS 134.170 provides that such a dismissal is a bar to further prosecution for the same offense if it is a misdemeanor, but is not a bar if it is a felony.).

South Dakota, S. D. Rev. Stat. 34.2205: "The entry of a nolle prosequi is abolished, and the state's attorney cannot discontinue a prosecution for a public offense, except as provided in section 34.2204."

Utah, Utah Code Ann. §77-51-5: "No prosecuting attorney can discontinue or abandon a prosecution for a public offense, except as provided in the next preceding section." (i.e., §77-51-4 provides that the court may dismiss a prosecution upon its own motion or upon the application of a prosecuting attorney; §77-51-6 provides that such a dismissal is a bar to further prosecution of a misdemeanor, but is not a bar to the further prosecution of a felony.)

6. Sixteen states have placed sole discretion for entry of *nol. pros.* in the court.

Alabama, Ala. Code Ann., tit. 15, §257: "An indictment must not be quashed, dismissed, discontinued or

abandoned without the permission of the court; and such permission must be entered of record."

Arkansas, Ark. Ann. Stat. §43-1230: "No attorney for the State shall enter a nolle prosequi on any indictment, or in any other way discontinue or abandon the same, without the leave of the court in which such indictment is pending being first entered on the minutes."

Colorado, Colo. Rev. Stat. 1963, tit. 39, §7-12: "Hereafter no criminal case pending in any court in this state shall be dismissed or a nolle prosequi therein entered by any district attorney or his deputy, unless upon a motion in open court, and by and with the consent and approval of such court or judge thereof, and such motion shall be supported or accompanied by a statement in writing concisely stating the reasons for such action, and which shall be filed with the record of the particular case and open to the inspection of the public."

Delaware, Del. Supreme Court Rule 48: "(a) The Attorney General may by leave of court file a nolle prosequi of an indictment, information or complaint and the prosecution thereupon shall terminate. Such a nolle prosequi may not be filed during the trial without the consent of the defendant."

Georgia, Ga. Code Ann. §27-1801: "After an examination of the case in open court, and before it has been submitted to the jury, the solicitor general may enter a nolle prosequi with the consent of the court. After the case has been submitted to the jury, a nolle prosequi shall not be entered except by consent of the defendant."

Hawaii, §258-40: "No nolle prosequi shall be entered in a criminal case in a court of record except by consent of the court upon written motion of the prosecuting attorney stating the reasons therefore. The court may deny the motion if it deems such reasons insufficient and if, upon further investigation, it decides that the prosecution shall continue, it may, if in its opinion the interests of justice require it, appoint a special prosecutor to conduct the case and allow him a fee. . . ."

Indiana, Ind. Stat. Ann. §9-910: "No criminal cause shall be dismissed except by order of the court on motion of the prosecuting attorney; and such motion must be in writing, and the reasons therefor must be stated in such motion and read in open court before such order is made; and the mere number of prosecutions against the same person shall not be a reason for dismissing any of such causes." (Note: Though this statute talks of 'dismissal' it is referred to as the State's nolle prosequi statute).

Kentucky, Ky. Rev. Stat. §455.070: "Before a court permits any Commonwealth's or county attorney to dismiss an indictment or enter a nolle prosequi in a case, the Commonwealth's or county attorney shall file a written statement, signed by him, setting forth the reasons for the dismissal or the failure to prosecute. The statement shall be entered upon the order book of the court and an order entered in accordance, therewith."

Maine, Me. Rev. Stat. Ann. tit. 30, ch. 1, §503: "In order to dismiss civil or criminal cases, the county attorney shall indorse upon the back of the writ, indictment or complaint in such cases a written order

of dismissal, together with a statement of reasons for dismissal, and said order of dismissal shall not take effect unless approved in writing by the justice presiding at the term when the said dismissal is made."

Michigan, Mich. Comp. Laws, Code of Crim. Proc., ch. 7, §767.29: "It shall not hereafter be lawful for any prosecuting attorney to enter a nolle prosequi upon any indictment, or in any other way to discontinue or abandon the same, without stating on the record the reasons therefor and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes."

Mississippi, Miss. Code Ann. §2566: "A district attorney shall not compromise any cause or enter a nolle prosequi, either before or after indictment found, without the consent of the court; and, except as provided in the preceding section, it shall not be lawful to dismiss a criminal prosecution at the cost of the defendant, but every cause must be tried, unless dismissed by consent of the court."

Ohio, Ohio Rev. Code Ann., tit. 29, §2941.33: "The prosecuting attorney shall not enter a nolle prosequi in any cause without leave of the court, on good cause shown in open court. A nolle prosequi entered contrary to this section is invalid."

Pennsylvania, Pa. Stat. Ann., tit. 19, §492: "No district attorney shall, in any criminal case whatsoever, enter a nolle prosequi, either before or after a bill found, without the assent of the proper court in writing first had and obtained."

Texas, Code of Crim. Proc. Ann., tit. 7, ch. 4, art. 577: "The district or county attorney may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge."

Washington, Wash. Rev. Code Ann., tit. 10, §46.090: "The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason for the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section."

Wyoming, Wyo. Comp. Stat. Ann., tit. 7, ch. 9, §7-198: "No indictment or information shall be nol-prossed, except by order of the court on the motion of the prosecuting attorney, and such motion must be in writing, and the reasons therefor must be stated in such motion and read in open court, before such order is made.

7. Several other states include some mention of *nol. pros.* in their statutory schemes.

Connecticut: G. S. 54-143: "The costs of prosecution shall not be imposed against any person convicted of crime; provided nothing in here shall prevent the dismissal of a complaint or information or the entry of a nolle prosequi upon the payment of a sum of money in such amount as is fixed by the court. . . ."

G. S. 54-90: "Whenever any criminal case is nolled in the superior court or in the court of common pleas, the clerk of the court shall make a record of such nolle."

G. S. 54-51: "Any person who gives information leading to the arrest and conviction of any person for theft of any motor vehicle, mule, ass, cattle, horse or poultry shall receive a reward of such sum, not exceeding one hundred dollars, as the court in which such conviction is had or as the presiding judge of such court may determine, which shall be paid by the comptroller upon certification by the clerk of such court of the amount so determined. The nolle of such complaint upon the payment of any sum of money shall be deemed a conviction within the meaning of this section."

G. S. 29-15: "When any person, having no prior criminal record, whose fingerprints and pictures are so filed has been found not guilty of the offense charged, or has had such charge nolled, his fingerprints, pictures and description shall, upon his request, be returned to him not later than sixty days after the finding of not guilty or after such nolle."

Florida: Note: G. S. 142.09-142.13 require the county to bear the costs of witness fees, etc., to keep records and accounts if a case is *nol. prossed.* There is no mention in the statutes of how or when the *nol. pros.* may be taken or by whom.

Illinois: Ann. Stat. §§34-8, 9, 14, 16, 17, 28 all refer to who shall bear the costs of the proceedings and keep accounts when a case is *nol. prossed.*

Louisiana: Rev. Stat. §15:327: "A nolle prosequi is a declaration made by the district attorney and filed in open court, that he will no longer prosecute a particular indictment or some offense in such indictment charged."

Rev. Stat. §15:328: "A nolle prosequi simply discharges a particular indictment or part thereof, and is no bar to a subsequent prosecution for the offense as to which the nolle prosequi was entered."

Rev. Stat. §15.329: "The exercise of the power to enter the nolle prosequi is a matter that shall be subject to the sound discretion and control of the district attorney, and in order to exercise that power he shall not have to obtain the consent of permission of the court."

Rev. Stat. §15:330: "After the indictment has been read to the jury, the district attorney is without authority to enter a nolle prosequi over the objection of the accused."

Rev. Stat. §15:331: "After conviction the district attorney can enter a nolle prosequi only in the following cases:

(1) When a new trial has been granted or a motion in arrest of judgment has been sustained;

(2) When the indictment is so defective that no judgment can be pronounced on the verdict;

(3) When the accused has been found guilty on several counts of the indictment, the district attorney may enter a nolle prosequi as to

such of these counts as are fatally defective and demand sentence on the good counts."

Maryland: Art. 41, §52: "No nolle prosequi shall be granted by the Governor but on condition that the cost of prosecution shall be paid by the person applying for the same."

Massachusetts: C. 277, §70A: "Except as otherwise provided by law, a nolle prosequi entered by a district attorney or assistant district attorney in a criminal case shall be accompanied by a written statement, signed by the district attorney or assistant district attorney making such entry, setting forth the reasons for such disposition. Said statement shall be filed with the pleadings."

Missouri: §558.170: "Every prosecuting attorney or assistant prosecuting attorney, or other person acting for the time being as such officer, who shall, in pursuance of any corrupt agreement with any defendant or defendants, or other person or persons, enter a nolle prosequi as to any indictment or dismiss or fail to prosecute, as provided by law, any indictment . . . wherein the state or any county shall be a party, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not less than five hundred dollars, or imprisoned in a county jail not less than three months."

Nebraska: §25-1323: "No complete record shall be made (1) in criminal prosecutions where the indictment has been quashed or where the prosecuting attorney shall have entered a nolle prosequi on the indictment. . . ."

New Mexico: §41-11-9: "In all criminal cases a nolle prosequi cannot be entered after any testimony has been introduced for the defendant."

Vermont: Vt. Stat. Ann. 13:6555: "If, upon the trial of a person charged with an offense, the facts given in evidence amount in law to a greater offense than the one charged, such person shall not by reason thereof be acquitted, but the court, in its discretion, may allow a nolle prosequi to be entered in order that he may be prosecuted for the greater offense."

8. Several states make no mention whatsoever of *nol. pros.* in their statutory schemes.

Alaska, Arizona, Kansas, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Wisconsin, West Virginia.

9. North Carolina is the only state which includes the *nol. pros.* "with leave" in its statutory scheme.

G. S. 15-175.

10. Several of the states that ratified the original Constitution included a provision for 'speedy trial' in their own constitutions.

New Jersey: Act 1795, Patterson's Rev. Laws, N. J. 1703-99, p. 168; Maryland: Act 1809, c. 125, §7; South Carolina: Eng. Act, *State* v. *Spergen*, 1 McCord 563 (1822); *State* v. *Stalnaker*, 2 Brev. 44 (1806); Delaware: Act 1793, c. IV, s. 3; Pennsylvania: Act Feb. 18, 1785, Sec. 3, *Commonwealth* v. *Sheriff and Gaoler of Allegheny County*, 16 Serg. + R. 304; New York: Act 1801, c. 65, s. 6; Rhode Island: s. 11, Habeas

Corpus Act p. 237; Rev. Public Law of Rhode Island 1798; Virginia: Act 1786, c. 57; *Ex parte Joseph Santee*, 2 Va. Cas. 363; Georgia: Eng. Act; *State* v. *Maurignos*, T. U. P. Charlt. 24 (1805; Massachusetts: Act 1784, c. 72, s. 13.

11. Many of the early acts and state decisions provided that trial had to be held within a specified time period or the indictment dismissed.

State v. *Phil*, 1 Stew. 31 (Ala. 1827); *State* v. *Maurignos*, T. U. P. Charl. 24 (Ga. 1805); *State* v. *Stalnaker*, 2 Brev. 44 (S. C. 1806).

12. Some courts felt that the accused should be discharged for any delay unless that delay had been caused by the accused.

State v. *Phil*, supra; *State* v. *Maurignos*, supra; *State* v. *Sims*, 1 Tenn. 253 (1807); *State* v. *Stalnaker*, supra; *Ex parte Joseph Santee* (dissent), supra; *Commonwealth* v. *Sheriff and Gaoler of Allegheny County*, supra.

13. Most of the federal cases have gone off on the ground that the accused has waived his right to a speedy trial unless he specifically demanded it.

MacKnight v. *United States*, 263 F. 832 (1st Cir. 1920); *Gerardino* v. *People of Puerto Rico*, 29 F. 2d 517 (1st Cir. 1928); *United States* v. *Rumrich*, 180 F. 2d 575 (2d Cir. 1950); *United States* v. *Holmes*, 168 F. 2d 288 (3d Cir. 1948); *Hart* v. *United States*, 183 F. 368 (6th Cir. 1910); *Carter* v. *State of Tennessee*, 18 F. 2d 850 (6th Cir. 1927); *Worthington* v.

United States, F. 2d 154 (7th Cir. 1924); *O'Brien* v. *United States*, 25 F. 2d 90 (7th Cir. 1928); *Bayless* v. *United States*, 147 F. 2d 169 (8th Cir. 1945); *Phillips* v. *United States*, 201 F. 259 (8th Cir. 1912); *Collins* v. *United States*, 20 F. 2d 574 (8th Cir. 1927); *Poffenbarger* v. *United States*, 20 F. 2d 42 (8th Cir. 1927); *Shepard* v. *United States*, 163 F. 2d 974 (8th Cir. 1947); *Daniels* v. *United States*, 17 F. 2d 339 (9th Cir. 1927); *Collins* v. *United States*, 157 F. 2d 409 (9th Cir. 1946); *Danziger* v. *United States*, 161 F. 2d 299 (9th Cir. 1947); *Pietch* v. *United States*, 110 F. 2d 817 (10th Cir. 1940); *Fowler* v. *Hunter*, 164 F. 2d 668 (10th Cir. 1947); *Morland* v. *United States*, 193 F. 2d 297 (10th Cir. 1951); *Ex parte Pickerill*, 44 F. Supp. 741 (N. D. Tex. 1942).

14. A great majority of the federal cases recognize expressly or impliedly that if a defendant does not waive his right to a speedy trial by failing to ask for it, he may, in a proper case, be entitled to a discharge because of unreasonable delay in bringing his case to trial.

MacKnight v. *United States*, supra; *Geraridino* v. *People of Puerto Rico*, supra; *United States* v. *Holmes*, supra; *Hart* v. *United States*, supra; *Carter* v. *State of Tenn.*, supra; *Worthington* v. *United States*, supra; *O'Brien* v. *U. S.*, supra; *Bayless* v. *U. S.*, supra; *Phillips* v. *U. S.*, supra; *Collins* v. *U. S.* (9th Cir.), supra; *Poffenbarger* v. *U. S.*, supra; *Collins* v. *U. S.* (8th Cir.), supra; *Danziger* v. *U. S.*, supra; *Pietch* v. *U. S.*, supra; *Morland* v. *U. S.*, supra; *Ex parte Pickerill*, supra; *Beavers* v. *Haubert*, 198 U. S. 77 (1905); *Kong* v.

United States, 216 F. 2d 665 (9th Cir. 1954); *Germany* v. *Hudspeth*, 209 F. 2d 15 (10th Cir. 1954); *D'Aquino* v. *United States*, 192 F. 2d 338 (9th Cir. 1951); rehearing denied 203 F. 2d 390; *United States* v. *McWilliams*, 163 F. 2d 695 (D. C. Cir. 1947); *Nolan* v. *United States*, 163 F. 2d 768 (8th Cir. 1947); *Story* v. *Hunter*, 158 F. 2d 825 (10th Cir. 1947); *Frizzell* v. *United States*, 2 F. 2d 398 (D. C. Cir. 1924).

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In The

Supreme Court of the United States

October Term, 1966

No. 100

PETER KLOPFER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR THE RESPONDENT

CITATION TO OPINION

The opinion of the Supreme Court of North Carolina (R. 15-17) is reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on January 14, 1966 (R. 17-18). The petition for a writ of certiorari was filed on April 14, 1966, and was granted on May 31, 1966 (R. 19). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3).

QUESTION PRESENTED

In State criminal prosecutions, is an accused's right to a speedy trial circumvented when a state is allowed to take a *nol. pros.* with leave over defendant's objection?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1) Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2) Fourteenth Amendment to the United States Constitution

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 24, 1964, a true bill of indictment was returned by the Grand Jury for the County of Orange, State of North Carolina, charging the defendant Peter Klopfer, with the criminal offense of Trespass in violation of N. C. G. S. 14-134. (R. 2-3, 7-8).

At the March, 1964, Special Criminal Session of the Superior Court of Orange County, State of North Carolina, the

defendant was placed on trial to answer the charge as laid in the bill of indictment. The defendant entered a plea of Not Guilty, and thereafter a mistrial was declared because the jury was unable to decide upon a verdict. (R. 3-5).

Subsequently, at the August, 1965, Criminal Session of the Superior Court of Orange County, the honorable Judge presiding granted the Solicitor's motion to take a *nol. pros.* with leave as to the trespass charge pending against the defendant. (R. 6).

The defendant objected and appealed to the North Carolina Supreme Court, that Court upholding the Solicitor's right to enter such motion as reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

ARGUMENT

AN ACCUSED'S RIGHT TO A SPEEDY TRIAL IS NOT CIRCUMVENTED WHEN A STATE IS ALLOWED TO TAKE A NOL. PROS. WITH LEAVE OVER DEFENDANT'S OBJECTION.

Petitioner, in essence, is contending that his having been subjected to criminal prosecution on the charge of Trespass, the arbitrary refusal of the State to proceed with the prosecution, as evidenced by the entry of a *nol. pros.* with leave, effectively deprived him of the opportunity to exonerate himself and impaired his ability to sustain any defense he might present in Court, thereby violating his constitutional right to a speedy and impartial trial.

The Supreme Court of North Carolina has, since its inception, recognized the right of the Solicitor, with the permission of the Court, to enter a *nol. pros.* In STATE v. FURMAGE, 250 N. C. 616 (1959), 109 S. E. 2d 563, the Supreme Court of North Carolina said, 109 S. E. 2d 563 at pages 567,.568:

"A solicitor, as a public officer and as an officer of the court, is vested with important discretionary powers. True, it is his responsibility, upon a fair and impartial trial, to bring forward all available evidence and to prosecute persons charged with crime. Even so, prior to prosecution, if he finds the available evidence insufficient to support a conviction, he may enter a *nolle prosequi* or *nolle prosequi* with leave. G. S. 15-175; WILKINSON v. WILKINSON, 159 N. C. 265, 74 S.E. 740. In S. v. Moody, 69 N. C. 529, Reade, J., said: 'It was discussed at the bar whether it is within the power of a solicitor to discharge a defendant or to enter a nol. pros., etc., or whether that is the province of the court. The rule is that it is usually and properly left to the discretion of the solicitor.' Also, see S. v. THOMPSON, 10 N. C. 613; S. v. BUCHANAN, 23 N. C. 59; S. v. CONLY, 130 N. C. 683, 41 S. E. 534; 27 C.J.S., District & Pros. Attys. Sec. 14 (1)."

The distinction between a *nol. pros.* and *nol. pros.* with leave was made in WILKINSON v. WILKINSON, 159 N. C. 265, 74 S. E. 740 (1912), at 74 S. E. page 741:

"A *nol. pros.*, in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse, the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias*, after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen." See also, STATE v. SMITH, 129 N. C. 546.

North Carolina has long recognized that when a *nol. pros.* is entered by the Solicitor, this, in effect terminates the matter for all practical purposes on the indictment since the defendant becomes amenable to another indictment on the same charge in any court of concurrent jurisdiction. STATE v. McNEIL, 10 N. C. 183 (1822). In so treating the effect of a *nol. pros.*, North Carolina is in the majority of jurisdictions. 21 Am. Jur. 2d, *Criminal Law*, Section 519; Anno., New Prosecution in Another Court, 177 A.L.R. 423.

Therefore, it would appear that a *nol. pros.* or *nol. pros.* with leave, does, for all practical purposes, terminate the proceedings once and for all and in no way jeopardizes a defendant's standing.

In STATE v. ROWLAND, 172 Kan. 224, 238 P 2d 949, 30 A.L.R. 2d 455, defendant was indicted for the offense of uttering forged checks. No trial was had at the term of Court following the indictment, but at the subsequent term a *nol. pros.* was entered by the State. Sixteen months after the first indictment had been filed another was obtained charging the same offense. Defendant, having been found guilty, appealed, charging that under a Kansas statute, he should have been tried before the Third Term of Court following the filing of the indictment. The Supreme Court of Kansas, although granting a new trial on other grounds, said, 30 A.L.R. 2d, at page 460:

> "Whatever may be the rule in other jurisdictions, this court long ago decided that the entering of a *nolle prosequi* with consent of the trial court did not prejudice a fresh prosecution on a new information charging the identical offense set forth in the prior information. See STATE v. RUST, 31 Kan. 509, 3 P 428, and cases cited. In STATE v. HART, 33 Kan. 218, 6 P 288, it was held: 'And after a new trial has been granted on the motion of the defendant in a criminal case, the attorney for the state, with the consent of the court, may enter a *nolle prosequi* without prejudice to a future prosecution, and thereafter the defendant may be put

upon his trial and convicted upon a new information charging the identical offense set forth in the prior information.' (Syl. 3).

"In STATE v. CHILD, 44 Kan. 420, 24 P 952, it was held: 'The mere entry of a *nolle prosequi*, or the dismissal of an indictment, with the consent of the court, is no bar to the filing of another indictment or information for the same offense.

" 'Where a prosecution fails on account of a defective indictment or information, the time during which it is pending is not to be computed as a part of the time limited for prosecution; and the accused, after the *nolle prosequi* or dismissal of an indictment or information, may, within the time prescribed, be again proceeded against for the same offense.' (Syl. 1, 2)."

The Supreme Court of the United States has not held expressly that the Sixth Amendment right to a speedy trial is made mandatory in state proceedings. However, this Court had held in prior decisions that most of the other Sixth Amendment rights are in fact binding on the states through the Fourteenth Amendment. POINTER v. TEXAS, 380 U. S. 400 (1965); ESCOBEDO v. ILLINOIS, 378 U. S. 478 (1964); DOUGLAS v. CALIFORNIA, 372 U. S. 353 (1963); GIDEON v. WAINWRIGHT, 372 U. S. 335 (1963).

The North Carolina Supreme Court, in STATE v. LOWRY, 263 N. C. 536, 139 S. E. 2d 870 (1965), stated that the Federal protection of the right to a speedy trial was unnecessary since the "fundamental law" of North Carolina fully secures to the defendant the right to a speedy trial. In so holding, the North Carolina Supreme Court stated that the question of whether or not a speedy trial was afforded the defendant must be determined in the light of the circumstances of each case, and the Court has the discretion in deciding what is a fair and reasonable time.

As to Petitioner's contention that he is being denied his

right to a speedy trial, the Respondent respectfully contends that the petitioner has no right to compel the State to prosecute. The alleged denial could be used by the Petitioner, if the State in the future elects to prosecute, as a shield. However, Petitioner should not be allowed to use such a contention as a sword, compelling the State to go to the expense of a trial when obviously the Solicitor feels that "Another go at it would not be worth the time and expense of another effort".

CONCLUSION

The State of North Carolina respectfully contends that the Petitioner has not, therefore, been denied his right to a speedy trial.

Respectfully submitted,

T. W. BRUTON
Attorney General

RALPH MOODY
Deputy Attorney General

Andrew A. Vanore, Jr.
Staff Attorney

SUPREME COURT OF THE UNITED STATES

No. 100.—October Term, 1966.

Peter H. Klopfer, Petitioner, v. State of North Carolina.	On Writ of Certiorari to the Supreme Court of North Carolina.

[March 13, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question involved in this case is whether a State may indefinitely postpone prosecution on an indictment without stated justification over the objection of an accused who has been discharged from custody. It is presented in the context of an application of an unusual North Carolina criminal procedural device known as the "*nolle prosequi* with leave."

Under North Carolina criminal procedure, when the prosecuting attorney of a county, denominated the solicitor, determines that he does not desire to proceed further with a prosecution, he may take a *nolle prosequi*, thereby declaring "that he will not, at this time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time." *Wilkinson* v. *Wilkinson*, 159 N. C. 265, 266–267, 74 S. E. 740, 741 (1912). But the taking of the *nolle prosequi* does not permanently terminate proceedings on the indictment. On the contrary, "When a *nolle prosequi* is entered, the case may be restored to the trial docket when ordered by the judge upon the solicitor's application." *State* v. *Klopfer*, 266 N. C. 349, 350, 145 S. E. 2d 909, 910 (1966). And if the solicitor petitions the court to *nolle prosequi* the case "with leave," the consent required

We, too, believe that the position taken by the court below was erroneous. The petitioner is not relieved of the limitations placed upon his life and liberty by this prosecution merely because its suspension permits him

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Watson, 394 Ill. 177, 68 N. E. 2d 265 (1946), cert. denied, 329 U. S. 769; La. Rev. Stat., Tit. 15, § 328 (1950); *Barnett* v. *State*, 155 Md. 636, 142 A. 96 (1928); *State* v. *Montgomery*, 276 S. W. 2d 166 (Mo. 1955); *In re Golib*, 99 Ohio App. 88, 130 N. E. 2d 855 (1955); State *ex rel. Hobbs* v. *Murrell*, 170 Tenn. 152, 93 S. W. 2d 628 (1936); *Ex parte Isbell*, 48 Tex. Crim. 252, 87 S. W. 145 (1905); *Dudley* v. *State*, 55 W. Va. 472, 47 S. E. 285 (1904); *Woodworth* v. *Mills*, 61 Wis. 44, 20 N. W. 728 (1884).

Alabama permits reinstatement of an indictment *nolle prossed* with leave, but only if the defendant cannot be brought before the court. See Ala. Code Ann., Tit. 15, § 251 (Supp. 1965). Thus this procedure is similar to that of filing away the indictment, discussed below.

Of the remaining States, only North Carolina and Pennsylvania have held that a *nolle prossed* indictment could be reinstated at a subsequent term. See *Commonwealth* v. *McLaughlin*, 293 Pa. 218, 142 A. 213 (1928).

Several States permit the removal of the indictment from the trial docket with leave to reinstate at some indefinite future date. But in each, use of the procedure has been limited to situations in which the defendant cannot be brought before the court or where he has consented to the removal. See, *e. g.*, *People* v. *Fewkes*, 214 Cal. 142, 4 P. 2d 538 (1931). *State* v. *Dix*, 18 Ind. App. 472, 48 N. E. 261 (1897); *Lifshutz* v. *State*, 236 Md. 428, 204 A. 2d 541 (1964), cert. denied, 380 U. S. 953; *Commonwealth* v. *John Dowdican's Bail*, 115 Mass. 133 (1874) (indictment may be filed away only after verdict and then only with the consent of the accused); *Gordon* v. *State*, 127 Miss. 396, 90 So. 95 (1921) (consent of defendant necessary); *Rush* v. *State*, 254 Miss. 641; 182 So. 2d 214 (1966) (but not if defendant was in a mental institution at the time the indictment was retired to the files). At one time, Illinois decisions indicated that when an accused was imprisoned within the State on another charge an indictment might be filed away without his consent. See, *e. g.*, *People* v. *Kidd*, 357 Ill. 133, 191 N. E. 244 (1934). But these decisions have since been overruled. See *People* v. *Bryarly*, 23 Ill. 2d 313, 178 N. E. 2d 326 (1961).

to go "whithersoever he will." The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation,"* the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

While there has been a difference of opinion as to what provisions of this Amendment to the Constitution apply to the States through the Fourteenth Amendment, that question has been settled as to some of them in the recent cases of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Pointer* v. *Texas*, 380 U. S. 400 (1965). In the latter case, which dealt with the confrontation of witnesses provision, we said:

> "In the light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that guarantee, like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights

* *United States* v. *Ewell*, 383 U. S. 116, 120 (1966).

to reinstate the prosecution at a future date is implied in the order "and the solicitor (without further order) may have the case restored for trial." *Ibid.* Since the indictment is not discharged by either a *nolle prosequi* or a *nolle prosequi* with leave, the statute of limitations remains tolled. *State* v. *Williams*, 151 N. C. 660, 65 S. E. 908 (1909).

Although entry of a *nolle prosequi* is said to be "usually and properly left to the discretion of the solicitor," *State* v. *Moody*, 69 N. C. 529, 531 (1873), early decisions indicate that the State was once aware that the trial judge would have to exercise control over the procedure to prevent oppression of defendants. See *State* v. *Smith*, 129 N. C. 546, 40 S. E. 1 (1901); *State* v. *Thornton*, 35 N. C. 256 (1852). But, in the present case, neither the court below nor the solicitor offer any reason why the case of petitioner should have been *nolle prossed* except for the suggestion of the Supreme Court that the solicitor, having tried the defendant once and having obtained a disagreement, "may have concluded that another go at it would not be worth the time and expense of another effort." In his brief in this Court, the Attorney General quotes this language from the opinion below in support of the judgment.

Whether this procedure is presently sustained by the North Carolina courts under a statute or under their conception of the common-law procedure is not indicated by the opinion of the court, the transcript or the briefs of the parties in the present case. The only statutory reference to a *nolle prosequi* is in § 15–175, General Statutes of North Carolina,[1] which on its face does not

[1] N. C. Gen Stat. § 15–175 (1965):

"A *nolle prosequi* 'with leave' shall be entered in all criminal actions in which the indictment has been pending for two terms of the court and the defendant has not been apprehended and in which a *nolle prosequi* has not been entered, unless the judge for

apply to the facts of this case. Perhaps the procedure's genesis lies in early nineteenth century decisions of the State's Supreme Court approving the use of a *nolle prosequi* with leave to reinstate the indictment, although those early applications of the procedure were quite different from those of the period following enactment of § 15–175. Compare *State* v. *Thompson*, 10 N. C. 613 (1825), and *State* v. *Thornton*, 35 N. C. 256 (1852) (capias issued immediately after entry of the *nolle prosequi* with leave) with *State* v. *Smith*, 170 N. C. 742, 87 S. E. 98 (1915) (capias issued eight years after a *nolle prosequi* with leave was taken, even though the defendant had been available for trial in 1907).

The consequence of this extraordinary criminal procedure is made apparent by the case before the Court. A defendant indicted for a misdemeanor may be denied an opportunity to exonerate himself in the discretion of the solicitor and held subject to trial, over his objection, throughout the unlimited period in which the solicitor may restore the case to the calendar. During that period, there is no means by which he can obtain a dismissal or have the case restored to the calendar for trial.[2] In spite of this result, both the Supreme Court and the Attorney General state as a fact, and rely upon it for affirmance

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good cause shown shall order otherwise. The clerk of the superior court shall issue a capias for the arrest of any defendant named in any criminal action in which a *nolle prosequi* has been entered when he has reasonable ground for believing that such defendant may be arrested or upon the application of the solicitor of the district. When any defendant shall be arrested it shall be the duty of the clerk to issue a subpoena for the witnesses for the State endorsed on the indictment."

The provision was originally enacted in 1905.

[2] On oral argument, counsel for the State informed the Court that a North Carolina indictment could be quashed only if it contained a vitiating defect. See also N. C. Gen. Stat. §§ 15–153, 15–155 (1965).

in this case, that this procedure as applied to the petitioner placed no limitations upon him, and was in no way violative of his rights. With this we cannot agree.

This procedure was applied to the petitioner in the following circumstances:

On February 24, 1964, petitioner was indicted by the grand jury of Orange County for the crime of criminal trespass, a misdemeanor punishable by fine and imprisonment in an amount and duration determined by the court in the exercise of its discretion.[3] The bill charged that he entered a restaurant on January 3, 1964, and, "after being ordered . . . to leave the said premises, willfully and unlawfully refused to do so, knowing or having reason to know that he . . . had no license therefor. . . ." Prosecution on the indictment began with admirable promptness during the March 1964 Special Criminal Session of the Superior Court of Orange County; but, when the jury failed to reach a verdict, the trial judge declared a mistrial and ordered the case continued for the term.

Several weeks prior to the April 1965 Criminal Session of the Superior Court, the State's solicitor informed petitioner of his intention to have a *nolle prosequi* with leave entered in the case. During the session, petitioner, through his attorney, opposed the entry of such an order in open court. The trespass charge, he contended, was abated by the Civil Rights Act of 1964 as construed in

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[3] N. C. Gen. Stat. § 14–134 (Supp. 1965). Although not expressly limited by statute, the extent of punishment is limited by N. C. Const. 1868, Art. I, § 14 ("Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted"). See *State* v. *Driver*, 78 N. C. 423 (1878). Decisions of the state courts indicate that imprisonment for up to two years would not be an "unusual punishment." See, *e. g.*, *State* v. *Farrington*, 141 N. C. 844, 53 S. E. 954 (1906). The constitutional limitation upon the amount of the fine has not been judicially determined.

Hamm v. *City of Rock Hill*, 379 U. S. 306 (1964). In spite of petitioner's opposition, the court indicated that it would approve entry of a *nolle prosequi* with leave if requested to do so by the solicitor. But the solicitor declined to make a motion for a *nolle prosequi* with leave. Instead, he moved the court to continue the case for yet another term, which motion was granted.

The calendar for the August 1965 Criminal Session of the court did not list Klopfer's case for trial. To ascertain the status of his case, petitioner filed a motion expressing his desire to have the charge pending against him "permanently concluded in accordance with the applicable laws of the State of North Carolina and of the United States as soon as is reasonably possible." Noting that some 18 months had elapsed since the presentment, petitioner, a professor of zoology at Duke University, contended that the pendency of the indictment greatly interfered with his professional activities and with his travel here and abroad. "Wherefore," the motion concluded, "the defendant . . . petitions the Court that the Court in the exercise of its general supervisory jurisdiction inquire into the trial status of the charge pending against the defendant and to ascertain the intention of the State in regard to the trial of said charge and as to when the defendant will be brought to trial."

In response to the motion, the trial judge considered the status of petitioner's case in open court on Monday, August 9, 1965, at which time the solicitor moved the court that the State be permitted to take a *nolle prosequi* with leave. Even though no justification for the proposed entry was offered by the State, and, in spite of petitioner's objection to the order, the court granted the State's motion.

On appeal to the Supreme Court of North Carolina, petitioner contended that the entry of the *nolle prosequi* with leave order deprived him of his right to a speedy

trial as required by the Fourteenth Amendment to the United States Constitution. Although the Supreme Court acknowledged that entry of the *nolle prosequi* with leave did not permanently discharge the indictment, it nevertheless affirmed. Its opinion concludes.

> "Without question a defendant has the right to a speedy trial, if there is to be a trial. However, we do not understand the defendant has the right to compel the State to prosecute him if the State's prosecutor, in his discretion and with the court's approval, elects to take a *nolle prosequi*. In this case one jury seems to have been unable to agree. The solicitor may have concluded that another go at it would not be worth the time and expense of another effort. In this case the solicitor and the court, in entering the *nolle prosequi* with leave followed the customary procedure in such cases. Their discretion is not reviewable under the facts disclosed by this record. The order is affirmed."

The North Carolina Supreme Court's conclusion—that the right to a speedy trial does not afford affirmative protection against an unjustified postponement of trial for an accused discharged from custody—has been explicitly rejected by every other state court which has considered the question.[4] That conclusion has also been

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[4] See *Rost* v. *Municipal Court of Southern Judicial District*, 184 Cal. App. 2d 507, 7 Cal. Rptr. 869 (1st Dist. 1960); *Kistler* v. *State*, 64 Ind. 371 (1879); *Jones* v. *Commonwealth*, 114 Ky. 599, 71 S. W. 643 (1903); *Barrett* v. *State*, 155 Md. 636, 142 A. 96 (1928); *Hicks* v. *Boyne*, 236 Mich. 699, 211 N. W. 35 (1926); *State* v. *Artz*, 154 Minn. 290, 191 N. W. 605 (1923).

See also *Jacobsen* v. *Winter*, — Idaho —, 415 P. 2d 297 (1966); *People* v. *Bryarly*, 23 Ill. 2d 313, 178 N. E. 2d 326 (1961); *People* v. *Prosser*, 309 N. Y. 353, 130 N. E. 2d 891 (1955); *State* v. *Couture*, 156 Me. 231, 163 A. 2d 646 (1960); *State* v. *Keefe*, 17 Wyo. 227, 98 P. 122 (1908) (the right to a speedy trial may be violated by

implicitly rejected by the numerous courts which have held that a *nolle prossed* indictment may not be reinstated at a subsequent term.[8]

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undue delay in bringing a prisoner confined within the State to trial, even though he is not held in custody under the indictment).

Dicta in decisions of the Colorado, Iowa, and Utah courts clearly indicate that these States would also hold that the speedy trial right would protect a defendant in petitioner's position: see *Ex parte Miller*, 66 Col. 261, 263–264, 180 P. 749, 750–751 (1919); *Pines* v. *District Court In and For Woodbury County*, 233 Iowa 1284, 1294, 10 N. W. 2d 574, 580 (1943); *State* v. *Mathis*, 7 Utah 2d 100, 103, 319 P. 2d 134, 136 (1957).

Although Pennsylvania has not decided the question presented by this case, decisions of its Supreme Court indicate that the "right to a speedy trial" is only applicable to a man held in prison. See *Commonwealth ex rel. Smith* v. *Patterson*, 409 Pa. 500, 187 A. 2d 278 (1963). But in that case, the Commonwealth's Supreme Court held that the delay in trying the defendant and the failure to give him notice of the pendency of a complaint for eight years constituted a denial of due process. Moreover, Rule 316 of the Commonwealth's code of criminal procedure authorizes the court to dismiss a case which has not been brought to trial within a "reasonable time."

By rule or legislation in 17 States, any defendant, whether at large or in custody, whose trial has been unduly delayed is entitled to a dismissal. See Ariz. Rules Crim. Proc. 236; Cal. Pen. Code § 1382; Ga. Code Ann. § 27–1901 (1953); Idaho Code, Tit. 19, § 3501 (1948); Iowa Code § 795.2 (1962); La. Rev. Stat., Tit. 15, §§ 7.8–7.11 (Supp. 1962); Me. Rev. Stat. Ann. § 15:1201 (1964); Mont. Rev. Code Ann. § 94–9501 (1947); Nev. Rev. Stat. § 178.495; N. J. Rev. Rules Crim. Proc. 3–11–3 (1958); N. D. Rev. Code § 29–1801 (1943); Okla. Stat., Tit. 22, § 812 (1951); Ore. Rev. Stat. § 134.120; S. D. Code § 34.2203 (Supp. 1960); Utah Code Ann. § 77–51–1 (1953); Wash. Rev. Code § 10.46.010; W. Va. Code § 6210 (1961).

[8] Thirty States continue to permit a prosecuting official to enter a *nolle prosequi*. Legislation or court decisions in 13 of these proscribe reinstatement of the indictment at a subsequent term. See *Lawson* v. *People*, 63 Colo. 270, 165 P. 771 (1917); *Price* v. *Cobb*, 60 Ga. App. 59, 61, 3 S. E. 2d 131, 133 (1939) (by implication); *Jones* v. *Newell*, 117 So. 2d 753 (D. C. App. 2d Fla., 1960); *State* v. *Wong*, 47 Hawaii 361, 389 P. 2d 439 (1964); *People* v.

We, too, believe that the position taken by the court below was erroneous. The petitioner is not relieved of the limitations placed upon his life and liberty by this prosecution merely because its suspension permits him

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to go "whithersoever he will." The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation,"* the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

While there has been a difference of opinion as to what provisions of this Amendment to the Constitution apply to the States through the Fourteenth Amendment, that question has been settled as to some of them in the recent cases of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Pointer* v. *Texas*, 380 U. S. 400 (1965). In the latter case, which dealt with the confrontation of witnesses provision, we said:

> "In the light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the States by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law. We hold that petitioner was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment, and that guarantee, like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights

* *United States* v. *Ewell*, 383 U. S. 116, 120 (1966).

against federal encroachment.' *Malloy* v. *Hogan*, *supra*, 378 U. S., at 10." [7]

We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, "We will sell to no man, we will not deny or defer to any man either justice or right"; [8] but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).[9] By the late thirteenth century, justices, armed with commissions of gaol delivery and/or oyer and terminer [10] were visiting the

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[7] 380 U. S., at 406.

[8] Magna Carta, c. 29 [c. 40 of John's Charter of 1215] (1225), translated and quoted in Coke, The Second Part of the Institutes of the Laws of England, 45 (Brooke, 5th ed., 1797).

[9] "4. And when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken, let the sheriffs send word to the nearest justice by some well-informed person that they have arrested such men, and the justices shall send back word to the sheriffs informing them where they desire the men to be brought before them; and let the sheriffs bring them before the justices." II English Historical Documents 408 (1953).

[10] An example of the Commission of gaol delivery is set forth in Goebel, Cases and Materials on the Development of Legal Institutions 53 (7th rev. 1946):

"The lord king to his beloved and faithful Stephen de Segrave and William Fitz Warin, greeting: Know that we have appointed you justices to deliver our gaol at Gloucester, in accordance with the custom of our realm, of the prisoners arrested and held there. And hence we order you that in company with the coroners of the county of Gloucester you convene at Gloucester on the morrow of the festival of the Holy Trinity in the twelfth year of our reign [Monday, May 22, 1228], to deliver the aforementioned gaol, as

countryside three times a year."[11] These justices, Sir Edward Coke wrote in Part II of his Institutes, "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, without detaining him long in prison."[12] To Coke, prolonged detention without trial would have been contrary to the law and custom of England;[13] but he also believed that the delay in trial, by itself, would be an improper denial of justice. In his explication of Chapter 29 of the Magna Carta, he wrote that the words "We will sell to no man, we will not deny or defer to any man either justice or right" had the following effect:

> "And therefore, every subject of this realme, for injury done to him *in bonis, terris, vel persona*, by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall and speedily without delay."[14]

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aforesaid, for we have ordered our sheriff of Gloucestershire that at the aforesaid time and place he cause to come before you all the prisoners in the aforesaid gaol and all persons attached to appear against them and on account of them. In witness whereof, etc. Dated April 20, in the twelfth year of our reign."

"The judges commissioned in a general oyer and terminer commission," Professor Goebel writes, "are ordered to inquire by grand jury of named crimes, from treasons to the pettiest offense, as to all particulars and to hear and determine these according to the law and custom of the realm." *Id.*, at 54.

[11] *Id.*, at 54.

[12] Coke, *op. cit. supra*, note 8, at 43.

[13] See, *Id.*, at 43.

[14] *Id.*, at 56. "Hereby it appeareth," Coke stated in the next paragraph, "that justice must have three qualities, it must be *libera, quia nihil iniquius venali justitia; plena, quia justitia non debet*

Coke's Institutes were read in the American Colonies by virtually every student of the law.[15] Indeed, Thomas Jefferson wrote that at the time he studied law (1762–1767), "*Coke Lyttleton* was the universal elementary book of law students."[16] And to John Rutledge of South Carolina, the Institutes seemed "to be almost the foundation of our law."[17] To Coke, in turn, Magna Carta was one of the fundamental bases of English liberty.[18] Thus, it is not surprising that when George Mason drafted the first of the colonial bills of right,[19] he set forth a principle of Magna Carta, using phraseology similar to that of Coke's explication: "[I]n all capital or criminal prosecutions," the Virginia Declaration of Rights of 1776 provided, "a man hath a right . . . to a speedy trial . . . ."[20] That this right was considered fundamental at this early period in our history is evidenced by its guarantee in the constitutions of several of the States of the new nation,[21]

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claudicare; et celeris, quia dilatio est quaedam negatio; and then it is both justice and right." Later in the explication of Chapter 29, Coke wrote that in conformity with the promise not to delay justice, all of the King's "commissions of oier, and terminer, of goale delivery, of the peace, &c. have this clause, *facturi quod ad justitiam pertinet, secundum legem,* and *consuetudinem angliae,* that is, to doe justice and right, according to the rule of the law and custome of England . . . ."

[15] See Warren, History of the American Bar 157–187 (1911); Meador, Habeas Corpus and Magna Carta 23–24 (1966).

[16] Quoted in Warren, *op. cit. supra,* note 15, at 174.

[17] Quoted in Bowen, The Lion and the Throne 514 (1956).

[18] See Coke, *op. cit. supra,* note 8, at A4 (Proeme).

[19] See 1 Rowland, The Life of George Mason 234–266 (1892).

[20] See Va. Declaration of Rights 1776, § 8.

[21] See Del. Const. 1792, Art. I, § 7; Md. Declaration of Rights 1776, Art. XIX; Pa. Declaration of Rights 1776, Art. IX; Va. Declaration of Rights 1776, § 8. Mass. Const. 1780, Part I, Art. XI, provided:

"Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged

as well as by its prominent position in the Sixth Amendment. Today, each of the 50 States guarantees the right to a speedy trial to its citizens.

The history of the right to a speedy trial and its reception in this country clearly establishes that it is one of the most basic rights preserved by our Constitution.

For the reasons stated above, the judgment must be reversed and remanded for proceedings not inconsistent with the opinion of the Court.

It is so ordered.

MR. JUSTICE STEWART concurs in the result.

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to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

This has been construed as guaranteeing to all citizens the right to a speedy trial. See *Commonwealth* v *Hanley*, 337 Mass. 384, 149 N. E. 2d 608 (1958). A similar provision was included in the New Hampshire Constitution of 1784, Part I, Art. XIV.

Kentucky, Tennessee, and Vermont, the three States which were admitted to the Union during the eighteenth century, specifically guaranteed the right to a speedy trial in their constitutions. See Vt. Const. 1786, c. I, Art. XIV; Ky. Const. 1792, Art. XII, § 10; Tenn. Const. 1796, Art. XI, § 9.

SUPREME COURT OF THE UNITED STATES

No. 100.—October Term, 1966.

Peter H. Klopfer, Petitioner, v. State of North Carolina.	On Writ of Certiorari to the Supreme Court of North Carolina.

[March 13, 1967.]

Mr. Justice Harlan, concurring in the result.

While I entirely agree with the result reached by the Court, I am unable to subscribe to the constitutional premises upon which that result is based—quite evidently the viewpoint that the Fourteenth Amendment "incorporates" or "absorbs" *as such* all or some of the specific provisions of the Bill of Rights. I do not believe that this is sound constitutional doctrine. See my concurring opinion in *Pointer* v. *Texas*, 380 U. S. 400.

I would rest decision of this case not on the "speedy trial" provision of the Sixth Amendment, but on the ground that this unusual North Carolina procedure, which in effect allows state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment. To support that conclusion I need only refer to the traditional concepts of due process set forth in the opinion of The Chief Justice.